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Francis O F *Margrave*

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C O N T E N T S.

LECTURE THE FIRST.

Of the Laws of Man's Nature - - - - - 17

LECTURE THE SECOND.

Of civil, positive, or instituted Law - - - - - 17

LECTURE THE THIRD.

Of the several Species of Magistracy - - - - - 39

LECTURE THE FOURTH.

Of the Law of Nations - - - - - 59

LECTURE THE FIFTH.

*Of the Laws of England, in a general View, and with respect
to the various Sources from which they have been derived* - 77

LECTURE THE SIXTH.

*Of the Study and Profession of the Laws of England, with
a Delineation of the Plan pursued in the remaining Lec-
tures* - - - - - 97

LECTURE

CONTENTS



LECTURE I

Of the Law of Nature

LECTURE II

Of the Law of Nations

LECTURE III

LECTURE IV

Of the Law of Nations

LECTURE V

Of the Law of Nations

LECTURE VI

Of the Law of Nations

Of the Law of Nations

LECTURE THE FIRST.

OF THE LAWS OF MAN'S NATURE.

*Principem legem illam, et ultimam, mentem esse dicebant omnia ratione aut
cogentis, aut vetantis Dei. Cic. de leg. l. ii.*

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LECTURE THE FIRST

IN THE LAY OF MAN'S MIND

OF THE LAY OF MAN'S MIND

(1)

LECTURE THE FIRST.

OF THE LAWS OF MAN'S NATURE.

THE proper Introduction to a course of legal studies seems to be an inquiry into the principles of moral obligation, and of general jurisprudence. A due knowledge of the elements of natural law has by no means been diffused in the world, in proportion to its important usefulness and dignity. It appears from Barbeyrac's Historical Treatise of the Science of Morality, that whatever just opinions were entertained by some few philosophers, the founders of certain sects, their followers at least, even down to the scholastic commentators on Aristotle, for the most part degenerated into intricate and unprofitable refinements, or maintained errors pernicious to society, and unworthy of mankind.

As to Mr. Selden's attempt of deriving the law of nature and nations, from the precepts which, according to ancient tradition, were delivered to Noah, and have been expounded by the Jewish Rabbins, that very learned work is not in equal estimation with the writings of those who have paid more attention in their researches to the pure dictates of reason.

BUT though cultivated reason might have accomplished the undertaking, yet it was not till within the two last centuries, that the fundamental principles of moral jurisprudence were duly investigated and embraced. Within that period the writings of Hooker, Cumberland, and Butler among our own countrymen, and among foreigners those of Grotius, Winkler, Puffendorf, Burlamaqui, Bynkershoek, Barbeyrac, and Vattel have been received with very general and merited applause. The first book of Hooker's Ecclesiastical Polity, has the credit of preceding in time all the other publications alluded to, and is much relied on in the following discourse; in which, though I may reasonably suppose my audience not unconversant with the writings on this subject, I have judged it expedient to frame a compendious display of the elementary doctrines, relative to the natural law of morality.

ON these fundamental principles, human institutions depend as their ultimate support; these animate the positive systems of every country, and prevail alike in every age. The intrinsic force or moral essence of law, according to Cicero*, *non modò senior est, quàm ætas populorum et civitatum, sed æqualis illius cælum atque terras tuentis et regentis Dei*. More recent authors also, treating of general law, refer it to the Supreme Being, and his whole creation. The Deity, says Hooker†, is a law unto himself, and all his works, rational, sensible, and inanimate, have rules respectively conducting them to the ends of their existence. But contenting myself with barely mentioning these brief illustrations of what is understood by the universality of law, I proceed to consider it as it affects the moral agency of mankind.

It may be first observed, that it is not agreeable to the nature of man to live without law*. This is easily discovered and

* *De Legibus*, lib. II.

† *Ecclesiastical Polity*, b. i. §. 2.

‡ Hooker's *Ecclesiastical Polity*, b. i. §. 6, 7.

Puff. *Law of nat. and nations*, b. ii. c. 1.

Burlam. *nat. law*, p. i. c. 5. Grot. *de jure*

b. ii. p. *prolegom.* §. 5, 6, 7.

evinced.

evinced. The freedom of man's will is naturally constituted to be in subjection to his rational understanding. This faculty reaches higher than a knowledge of the sensible objects which surround us. It apprehends a justness, beauty, and proportion in human actions, which pre-supposes their conformity to some rule. Farther, we may perceive that the desire of happiness is inseparable from reason. Man proposes to himself his own good, his preservation, and the perfection or improvement of his nature. Now every aim or destination implies the expediency at least of some means of attaining such end. These arguments, drawn from the faculties of each man separately considered, infer the congruity of a rule or line of moral conduct.

BUT a more attentive consideration of man's nature, viewing him in his dependencies and relations, as a created and social being, will fully evince the truth of this assertion, that arbitrary licence is foreign from the scope of his existence; and will also teach us what those rules are, which constitute what is called the law of nature. *Natura juris* (says Cicero) *ad hominis repetenda natura*.

THIS law of nature is well defined by Dr. South*, to be the mind of God signified to a rational agent by the bare discourse of his reason, and dictating to him that he ought to act suitably to the principles of his nature, and to those relations that he stands under. Cumberland's definition applies not to the law of nature in the aggregate, but to each of the rules or canons separately, of which it consists, for he calls the whole system the laws of nature. *Lex naturæ* (says he) *est præscriptio a naturâ rerum ex voluntate primæ causæ menti satis aperte oblata vel impressa, actionem indicans bono rationalium communi destrictiorem, quam, si præstetur, præmia, sin negligatur, pœna sufficienter, in naturâ rationalium sequuntur.*

* De leg. l. i.

† Sermon, vol. i. p. 404.

‡ De leg. naturæ, c. 1.

As therefore the law of nature is to guide the faculty of the will in the choice of good and evil, we must observe, that those actions, in respect to man, are defined to be good, which are available to his preservation and perfection, and those contrariwise evil, which debase and destroy him*. This remark, at first sight, may appear trite and obvious; but it may be made the foundation of useful advances in ethic discipline.

In contemplating the relations of man, we find the principal and most important to be that state of dependence in which he stands to his Creator. The existence of a first cause is ascertained not by argumentative deductions only, but by impressions prevalent in all ages, as well as congruous to reason, and which we are equally unable and unwilling to forego. These conceptions are instantaneously followed, or rather accompanied by the belief of infinite power, wisdom and goodness in the Deity. We manifestly see his unlimited superiority and pre-eminence in creating, and his benignity in dictating to his creatures these laws of nature, as the means of their welfare and happiness. Here then we perceive in the Author of the laws of nature the perfectly just and full right of imposing them as a legislator; and in man we discern the absolute duty of submission, as well as his interest in paying such obedience. These are the genuine sources of moral obligation. On this complex foundation the sense of it is built*.

Those, who think man's sociability (called by the Stoics *amour*) might suffice to preserve some order and justice in the world; and those, who speak of obligation arising from the mere approval of reason*, both sorts of speculatists, excluding natural theology from the argument, seem to deal in unprofitable refinements, not considering things as they are, but upon a subject so serious inventing and dwelling on arbitrary suppo-

* *Philos. Elem. j. 2. §. 1. c. 1. §. 8.*

* *Burl. nat. law, p. i. c. 9. §. 7. V. Puff.*

* *of n. and n. b. i. c. 6. §. 13. ad fin.*

* *Stoic. d. j. b. §. 6. 8. 11.*

* *Burl. nat. law, p. ii. c. 7.*

sitions¹. Besides, if rules so founded could obtain, they could not properly be termed laws, which cannot be abstracted from the authority of a lawgiver. It may be added, that in unlettered minds the conceptions of moral right and wrong immediately raise impressions of the pleasure or displeasure of the Deity; which cannot be wholly ascribed to habitual association; for it does not rest here; the obvious and evident connexion between the corresponding ideas is afterwards confirmed by maturest reason and contemplation.

We see therefore that the will of the Creator, or what he hath ordained in respect to the free-agency of man, is, in the most absolute and proper sense, the law of man's nature. The necessity of existing rules, directory of human actions, hath been before maintained. The sovereign legislator hath therefore in fact exercised his consummate authority. He hath ordained certain measures of human conduct. The supreme wisdom, which established such harmonious regularity in the planetary system, hath not abandoned the moral world to chance and wild disorder. It remains to be considered, how man attains to a knowledge of the law thus ordained for his observance.

CERTAIN ethical writers mention two distinct inlets of this necessary science; the one, moral sense or instinct, the other, reason. These faculties are said to combine their operations in pointing out and ascertaining the path of human conduct.

In respect to the former of these qualities, moral good and evil are observed to affect the mind with an impression, and as it were a sort of taste, instantly discerned and independent of reflexion. Illustrious examples of fortitude or benevolence excite admiration as readily and irresistibly as our outward

¹ V. Barrow's works, vol. ii. p. 455.
(ed. 1683.)

² Encl. nat. law, p. ii. c. 3. and c. 7. §. 4.

λογον εχει καὶ αὐτὸ, το δ' αὖτε εχει μὴ καὶ αὐτὸ, λογῷ δ' ὑποκινῶν δυνάμει.
Aristot. Polit. l. vii. c. 14.

organs are touched by the properties of material objects. Thus also compassion and other emotions spring with the same alertness from the occasions to which they are adapted. The hypothesis does not infer that any moral ideas, as the amiableness of virtue, or the hideousness of cruelty, are innate. It is sufficient for the purpose insisted upon, that the minds of all men, as well as their outward frames, are naturally susceptible of the like feelings from suitable objects, and that too by a sudden energy distinct from reason and reflexion.

In a late treatise (intituled *A Dissertation on Obligation*, and prefixed to a Summary of the Roman Law) the preceding theory has been thus illustrated: "All simple impressions are thought incapable of definition; colors must be presented to the sight, and sounds to the ear; no description will avail: in like manner the only possibility of raising the affections of fear, joy, or the like, is by reminding men of what they felt on some antecedent occasion, or by placing them again in a similar situation." Such is the idea intended to be conveyed by those who speak of this faculty called moral sense or instinct.

THESE first emotions may sometimes serve to anticipate the necessity of deliberation, especially in uncultivated minds, or where dispatch is requisite. Whether in such cases reason exerts itself at all, or its exertions become by habit unattended to and unperceived, may be difficult to determine. However, the more genuine use of moral sense seems to be to instigate the supineness of reason, and to impel obedience to what that shall dictate.

FOR reason, or the faculty of perceiving the relation between ideas, and of inferring just consequences, hath, in regard to our present subject, the prerogative of ascertaining, regulating and enforcing the operations of that instinct, by which its powers are, as it were, awakened and put in action. Moral truth is indeed capable of satisfactory demonstration:

But

LECT. I. MAN'S NATURE.

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But who would exert his reason on the fitness of actions, or after such exertion would not want a sufficient propensity to practical observances, if destitute of this animating principle called moral sense? This may be illustrated by very briefly considering the law of nature, as divided into duties of religion; secondly, those which a man is said to owe to himself; and thirdly, those which respect society.

FIRST, That God is to be worshipped and obeyed, is a truth to which reason must assent. But a sincere zeal, the moral sensations of duty and gratitude, seem to be the effect of a distinct faculty of the mind, from that which argumentatively traces the adorable nature and attributes of the Deity, and the dependence of his creatures.

SECONDLY, As to the duties which a man is said to owe to himself, that the greater good is to be chosen before the less, is a maxim approved by reason. Reason also instructs us in the means of attaining good, teaching, for instance, that the best things, where they are not hindered, do still produce the best operations, and pursuing that course of argument*. But the very appetite itself of good is a primitive and active principle, independent of reflection; and the prospect of happiness instantly affects the faculty called moral sense with eagerness and alacrity.

LASTLY, reason viewing men as they stand in relation to each other, assents to that directory precept of social duty, "*Quod tibi fieri non vis, alii ne feceris*;" a sentiment agreed upon by all nations, as St. Augustine* remarks, in opposing the error of those who deny that there is any such thing as essential justice, independent of the laws, usages and received opinions of each particular country. The expectant desire of receiving good from our equals in nature, implies a reciprocal obligation

* Hook. Eccl. Pol. b. i. §. 8.

* *De Div. Christ.* l. iii. c. 14.

of benefitting them^{*}. It is reason also which must investigate and determine the apt means of promoting the happiness of mankind, to which end certain general rules are easily discoverable[†]. But still all these reasonings might rest in fruitless speculation, instead of leading to a practically moral effect, unless the other faculty before spoken of should exert itself, and the mind (as it were) assume a different character. It conceives, as we have already seen, an instantaneous admiration or disgust at moral beauty or deformity. What we so readily approve or condemn in others, can never be indifferent to us in ourselves; but we must be conscious of a duty to pursue the one, and avoid the other. This is called by the Author[‡] before alluded to "Sensation of Obligation," and treated of by him as a necessary spring to virtue, (in furtherance of the dictates of reason,) without which we should as calmly and inactively acquiesce in the perception of moral truth, in regard to practical duties, as if we had been engaged in mathematical demonstrations. Certain however it is, that these impressions being alike in all men, and the immediate gift of the Creator, strengthen the conclusions of reason, and instigate our obedience to them. That which we feel an obligation to perform, others, passion'd as ourselves, are sensible of a right to expect. Upon the whole, to act in conformity to these impulses, when approved and regulated by reason, seems not a very incompetent description[§] of moral rectitude.

BUT I would not be understood to intimate, that any man, much less the instructors of others, should suffer their minds to rest in a state of uncultivated inactivity, as to improvement in moral science, till accidental occasions from time to time affect that instinct, which I have been describing. Diligent reflection should clear our discernment, and habit confirm our dispositions towards good, lest our judgment should be misled by sudden impulse. We should exercise the talents allotted to

^{*} Hook. Eccl. Pol. b. i. §. 8.

[†] Diff. on Obl. p. 32.

[‡] Diff. on Obl. v. Locke Hum. Und.

b. ii. c. 21. §. 35.

[§] Diff. on Obl. p. 43.

us, both in studying and practising the rules of natural obligation.

HAVING spoken of the means of attaining to a knowledge of the laws of nature, or will of God prescribed to us, as we are his creatures, rational agents, and bearing various relations to the rest of mankind, I proceed to consider a common objection, before alluded to, and aimed at the general system of morality. If the laws of nature are investigable by reason, that being universally the same, it is asked, why gross instances of depravity have prevailed in some countries, and been avowed by a sort of national concurrence? The *common* source of such prevailing abominations seems to have been men's inattention or neglect in attempting to reconcile different rules of duty. To a diligent inquirer some of these popular and avowed transgressions will be found to be blended or tinged with sentiments more laudable, and to contain a tacit confession of some precept of virtue.

LET us essay, with this touchstone, two of the most striking instances alleged by objectors against natural morality. They, who offered their sons and their daughters unto idols, may be deemed to have displayed in the sacrifice of interests so dear, a zealous, though frantic, devotion. Besides which indeed their understandings, as to one country at least, are said to have been darkened by the immediate exertion of divine vengeance, as a punishment for former transgressions.

FARTHER, the exposing of new-born infants was not, it is true, confined to barbarous times or nations. This hideous custom partly arose from carrying parental authority to excess, and partly from a supposed inability, through indigence, of maintaining the abandoned offspring. It implied a belief of that natural obligation.

Hook. Eccl. Pol. 3, 4, 5. 9. * Gen. 1. viii. 1. 47. le. 21. Tyl. Civ. Law, 405, 406.

BUT notwithstanding such defects, great as they are, every country has upon the whole maintained a sense of the natural law of morality. I have before cited one maxim of justice of universal reception. There are many other moral tenets of general force and extent. No people ever disavowed an observance of domestic faith, or a sense of gratitude towards benefactors. All countries have acknowledged an obligation to perform what they themselves esteem and profess to be right: and insincerity has never passed for virtue. A confession of the duty of adhering to certain principles, discovered by the light of nature, has prevailed in all ages and nations; although in some particular regions abuses have crept in, and the true rules of morality confused, from causes easily assignable.

BUT while we ascribe such national errors chiefly to inattention in reconciling different rules of duty, we may be called upon to account for the mistakes imputed to the Stoic school, to the studious and virtuous inquirer after moral truth, " *diligentissime perpendenti momenta officiorum omnium.*" First, we must neither credit all that is said on this subject in the oration alluded to, nor let the affected singularities of Chrysippus pass for the tenets of the whole sect. The Roman lawyers were of old almost universally both Stoics and approved masters of moral jurisprudence*. The conformity in ethical discipline "*inter antiquam Academiam et Zenonem,*" is seriously urged by Cicero*, and the purity of Platonic morals appears in the Phædo and other Socratic writings, and is generally allowed: of which sect originally were many of the fathers of the Christian church*. The unpalatable doctrines of the Stoics, their strict abstinence and patience, were perhaps wilfully aggravated into unwarrantable extremities. But most of their doctrines are capable of a construction consonant to reason*. Thus the maxim, "*omnia paria esse delicta,*" probably meant no more:

* Cic. pro L. Muræna in præm.

* Taylor's Civ. Law, 46, &c.

* De Leg. l. i.

* Hænc. prælegum. Præleç. in Pæf.

* Barb. Hist. moral science, §. 27.

than

than that they were all transgressions of the divine will: for this school was eminently distinguished by its firm belief of the providential government of the world. Lastly, if errors were entertained among its true persuasions, we must remember that in these matters one oversight uncorrected, "*prava regula prima*," may easily produce very fatal enormities.

HOWEVER, it seems necessary only to reflect on what passes in our own minds, to be convinced that a due knowledge of the law of nature is attainable by the use of reason, divested of the prejudices of custom, uncorrupted by passions, and unimpaired by sensuality. Mr. Locke therefore, who was fully apprized of the facts which are made the grounds of objection, declares his opinion, "that they equally forsake the truth, who, running into the contrary extremes, either affirm an innate law, or deny that there is a law knowable by the light of nature, *i. e.* without the help of positive revelation."

THE general principles of natural law are perceived with much ease, and are obvious to common reason. Yet I must add, that we ought among those laws to comprehend whatever may possibly be known to be the duty of all men by necessary consequence, deduced out of clear and manifest principles. But we must not descend to conjectural probabilities, as to what is convenient, for that is a field of arbitrary determination, and the province of positive law.

CONCERNING also the force of the human understanding in discovering the laws of nature, the admirable author of Ecclesiastical Polity^a gives us an admonition highly deserving of attention and remembrance, namely, that there is no kind of faculty or power in man, or any other creature, which can rightly perform the functions allotted to it, without perpetual

^a Hum. Und. b. i. c. 3. §. 12.

^c Hook. Reel. Pol. b. i. §. 2.

^d Ibid.

aid and concurrence of the Supreme Cause of all things. Thus God may be considered as the promulgator, whom we have before contemplated as the author, of natural law: which is by some styled divine law, and the knowledge of it divine jurisprudence, in contradistinction to human positive institutions*. But there is another system still more immediately and properly divine, disclosed by God himself, and not investigable by the human faculties.

THE effect of the laws discerned by reason is inadequate to the full completion of those just desires after satisfactory happiness, implanted in every mind. To this end the preternatural means of a divine revelation were absolutely requisite, as Hooker* clearly proves, to whose arguments I only refer, that I may not be thought to invade the province of theological writers. But thus much was necessary to be mentioned, in order to a right view of that primitive moral law, on which immutable foundation human institutions ought to be erected, and to which human actions ought to conform. This prescript is we see the will of the Creator, whether investigated by the use of our faculties, or declared by revelation. The rational and revealed law therefore are both divine: they flow, in different channels, from the same adorable source. But if what reason discovers to be the divine will is therefore concluded to be the law of our nature, surely those parts of the divine will, which are expressly declared, must be thought more immediately prest on our attention and obedience. The natural law, taught by reason, may, as we have seen, be termed divine: so this revealed will of God may be called natural law in this behalf; that, by comparing it with the nature of man, its truth and necessity are made manifest as the only means of procuring him satisfactory happiness, and advancing him to the highest perfection which he is capable of attaining. This exact conformity, in respect to our sense of moral obligation, between the previous conclusions of reason, and the contents of those sacred

* *Heinss. Elem. j. n. & g. l. i. c. 1. §. 12.*

* *Eccl. Pol. b. 1. §. 11.*

volumes, is mentioned by Cumberland* as one proof of their authenticity. "*Sacras scripturas ideo credimus a Deo seu natura auctore proficisci, quoniam leges naturales ubique illustrant, mun-
niunt, promoventque.*"

It may here farther be observed, that reason inforces obedience to her dictates only by a general view of divine justice, and by displaying the different consequences of vice and virtue as they affect individuals and society. But the law divinely revealed has explicit sanctions, deterring men from crimes, and inviting them to their duty, by the most forcible addresses to their fears and hopes. It is true, the revealed law, besides those things which could not otherwise be either attained or known, contains in it many precepts of duty, which were discoverable by reason; and this is a concurrent instance of the divine bounty. For the inspired writings not only inforce, apply, and confirm the conscious testimony of reason, but clear up such things as accustomed depravity had perplexed and obscured. "*Data ergo lex est, ut, quæ sciebantur, auctoritatem haberent, et, quæ latere ceperant, manifestarentur.*"

BEFORE I conclude this Preliminary Discourse, I must observe, that the duties of morality are sometimes distinguished into the absolute or primary, and the hypothetical or secondary law of nature¹. The former respects men in their natural relations only, the latter presupposes them to be members of civil society. Thus, to invade what is rightfully in the immediate occupation of another, is esteemed a crime against the primary law of nature. The hypothetical law is violated by him who disturbs any right of property established by the particular institutions of the country, where the offence is committed. To seize the property of another, is intrinsically immoral and unjust². But what is to be deemed property? The difference

* *De leg. nat. prolegom.* §. 27.

¹ Hook. Eccl. Pol. b. i. §. 12.

² Taylor's Civil Law, p. 129, &c.

³ *Natural turpe.* Taylor's Civil Law, p. 151.

is, that, independently of civil society, proprietaryship is confined to the time and act of possession: by municipal regulations it is extended in point of duration, and variously modified, both as to the degrees of interest and beneficial ownership, and as to the forms and power of transmissiion.

THIS leads us to investigate the fabrics of human legislators. For the genius of positive, civil, or instituted law, which will be the subject of the next Lecture, could not properly be displayed without a previous inquiry into those important truths, of which I have ventured, because I was thus led, to treat.

LECTURE THE SECOND.

OF CIVIL, POSITIVE, OR INSTITUTED LAW.

Constat profectò, ad salutem civium, civitatumque incolumitatem, vitamque omnium quietam et beatam conditas esse leges: eosque, qui primam ejusmodi scita sanxerunt, populi ostendisse, ea se scripturas atque latoros, quibus Illi ascriptis susceptisque, honestè beatèque viverent. Cic. de leg. l. ii.

LECTURE THE SECOND

IN CIVIL RIGHTS OR INSTITUTIONS

THE CIVIL RIGHTS OR INSTITUTIONS
OF THE UNITED STATES
OF AMERICA

LECTURE THE SECOND.

OF CIVIL, POSITIVE, OR INSTITUTED LAW.

HAVING treated of that primeval moral Law, to which all men are naturally subjected by their Creator, and the means of attaining to the knowledge of it, I proceed now to take a general view of the works of human legislators.

THESE positive institutions are termed Civil Law, as being not universal, like the former; but, according to the expression in the Imperial Institutes*, *proprium ipsius civitatis*, peculiar to some political community or state; thus, it is there added, we may speak of the civil law of the Athenians, of the Romans, or any other people. They suppose therefore the existence of civil society, and consequently lead us first to enquire what is understood to be a nation, using its own laws, and describing by its boundaries the sphere of their operation.

THE wants, the fears, and the natural sociability of mankind, co-operating with united strength, so forcibly call upon us to associate for mutual defence and accommodation, that it is difficult to conceive, there ever existed a number of individuals, living together in the same territory independently, and

without any order or government; which Plato^b seems to treat as an utter impossibility. Barbeyrac^c indeed affects to recount instances of this kind; and Puffendorf^d asserts, that it was not peculiar to antient Sicily, to have such inhabitants as Homer^e describes, holding no public assemblies, observing no general laws, or order of government, each bearing sway in his own family, and careless of the conduct and concerns of others. It is equally pertinent to remark, that this account, even by so early an author, is introduced among poetical wonders, and adventures exciting admiration. Such state of life, if it ever existed, must have been of short duration; for the opinion of Aristotle, which he so often and confidently repeats, “*Φυσις πολιτικός ἄνθρωπος*,” is not easily refuted^f. Whether a desire of mere security, or a prospect of the comforts and conveniences of life, influenced the first founders of commonwealths, each of these ends was unattainable by an unconnected multitude, at least unless we could suppose not one, but even all men, to excel and be confirmed in virtue, above temptation, and above suspicion. Reason, therefore, dictated the necessity of civil associations.

BEFORE I proceed to define these associations, called nations or states, I shall consider two points, not improper for previous enquiry; one concerning what ought to be deemed the immediate or efficient cause of political union at the origin thereof; the other respecting the right of migration from an established commonwealth.

FIRST then I would observe, that this promptitude, this aptness to civil life, which I have described as implanted in our

^a De leg. l. iv.

^b On Grot. de j. b. l. 1. c. 1.

^c B. vii. c. 1. §. 5.

^d Ταπεινὸν δ' αὖτ' ἀνθρώπων βέλτερόν ἐστι δαίμων.
 Ἀλλ' οὐ γὰρ ὑψηλὸν ἀνθρώπων κλέος
 Ἐν στήθεσσι γλαφυροῖσι δαίμονα δὲ ἔχοντες
 Παιδὸν οὐδ' ἀλόχον οὐδ' ἀλλήλων ἀλλήλων.

^e Poë. b. vii. c. 1. §. 3.

Odyss. ix. v. 112, &c.

natures,

natures, and approved by reason, rests only in matter of inducement*. That which originally constitutes a nation, is common consent, tacit or express; for every state must have had some origin, before which it did not exist as such, however uncertain or remote the period. The people then assumed relations, which they had not before, which were no part of their natural condition, and which were the result of their own free agency.

NEITHER would it weaken the foregoing argument, if I should add, that the becoming members of civil society is an act from which man ought not morally to abstain; for nature and reason point it out to him as the will of his Creator. But still obedience thereto is an operation of the human will.

IT is common consent therefore, expressly or virtually given, which actually forms and ratifies civil associations. The other matters are reasons only, however strong, impelling that consent.

HERE I cannot but take notice, that the celebrated commentator^b on the laws of England seems to speak of the origin of society as a distinct thing from that of a civil government, professing he cannot believe there ever was a time when there was no such thing as society. If he refers to economical relations, to parental authority, and stipulated mastership and service between individuals; if he means what may be termed domestic society, or even such intercourse as the sameness of country and manners must produce; then the scriptural account of the primitive ages, certainly (as he alleges) confirms his and the universal opinion. For was the non-existence of such society ever asserted or supposed? Does this affect the present inquiry? Surely the question relates only to civil union; any degree whereof, however rude, is absolutely inseparable from some kind of civil laws and government. These cannot be disjoined even in idea, and must for their validity be referred to one and the same original.

* v. Puff. b. vii. c. i.

^b Introduc. §. 2.

THE author indeed declares, that when society is once formed, government results of course. But society *is not formed*, the relations of civil life do not begin, till government is erected. Even supposing (for the sake of being more perspicuous) that men's intention of forming a civil community, was taken as a *previous resolve*, before they agreed on the constitution of any kind of government, still they would not really become a state; society would not be actually formed, notwithstanding the former vote, till the date of political superiority and subjection. Civil society therefore implies the coequality of civil government.

THAT elegant writer contrasts society with an "unnected state of nature." Hence he appears by society to mean political association or connexions; for the rights and relations of private life are not excluded from a *state of nature*. If this be the meaning, then the scriptural account has been understood so differently from the sense for which he alleges it, that the patriarchal age is one of the instances cited by Barbeyrac to show there was a time when men lived exempt from civil government and laws.

HOWEVER the historical fact may be of a social contract, government ought to be, and is generally *considered* as founded on consent, tacit or express, on a real, or *quasi*, compact. This theory is a material basis of political rights; and as a theoretical point is not difficult to be maintained. For what gives any legislature a right to act, where no express consent can be shewn? what, but immemorial usage? and what is the intrinsic force of immemorial usage, in establishing this fundamental or any other law, but that it is evidence of common acquiescence and consent? Not that such consent is subsequently revocable, at the will even of all the subjects of the state, for that would be making a part of the community equal in power to the whole originally, and superior to the rulers thereof after their establishment.

BUT

BUT why indeed should an express social contract appear so strange as never to have happened in any age or country? A multitude of wandering families might perhaps at the same time fix their abode, build their contiguous huts, and establish an arbitrator of their differences, or agree on some rude principles of civil order. But since such contract is rarely, *if ever*, contended for as an historical fact, to ridicule the probability of it is rather a superfluous attempt, though not of an alarming tendency, when it comes from so respectable a writer as Dr. Tucker, who, in a masterly manner, maintains an *implied* contract of equal validity with the most positive stipulation, as to all good political deductions; nor are we more apprehensive, when the same pleasantry is indulged by the celebrated Commentator, who, though he declines speaking of the origin of government, admits in terms the natural equality of mankind.

I HAVE here been speaking of the original formation or cement of any civil society or state. For, as to the second point, respecting the right of migration, I am far from maintaining, that any consent, tacit or express, is essential to induce the duty of subjection from individuals born under an established government.

THE obligation of *natural* law is of universal extent and perpetual duration. The duties also of *civil* life, though not indeed equally permanent or sacred, cannot, I apprehend, be discarded at pleasure; and that no individual has a moral right to cast off his allegiance to the state, and migrate into another country, *contrary to the declared will of the sovereign power*. I do not meddle with the question, whether colonies have any right, and in what situation of affairs, to separate from the superior state: as to which point I have met with nothing sufficient to inform my judgment: but as to individuals, they cannot cease to be under the protection of government, and of course to owe subjection to it, while they are carrying such design of spontaneous exile into execution. † To obey also the lawful commands of our civil governors, is a duty binding on

† 1. *Blackst. Com.*
58 -

the conscience. To these considerations may be added that of gratitude, which is too much excluded from political and national concerns; and another principle, virtuous in itself, and laudable under due regulations, I mean that love of our country, which should incite us to promote its welfare and defence.

ANY restraint indeed on the power of migration, is repugnant to the panegyric which Cicero¹ pronounces on the antient laws of Rome. "*O jura præclara atque divinitus jam inde a principibus Romani nominis a majoribus nostris comparata, ne quis nostrum plus quam unius civitatis esse possit: (dissimilitudo enim civitatum varietatem juris habeat necesse est) ne quis invitatus civitate mutetur, neve in civitate maneat invitus. Hæc enim sunt fundamenta firmissima nostræ libertatis, sui quemque juris et retinendi et dimittendi esse dominum.*" It is true likewise, that among the Roman laws of a more recent date, we find it written: "*de sua quâ civitate cuique constituendi facultas libera est.*" But Grotius², in explaining this and another passage in the Digests to the same effect, shews that the licence in effect was only to remove from one part of the Roman state to another, and was founded in political expedience. And although Mr. Locke³ maintains, that a child is born a subject of no country or government, yet, sincerely professing a general deference to his opinions, I shall assert, that the laws of this country seem to have reason on their side, when they speak of natural-born subjects, and when they consider allegiance due from the time of protection afforded, without regard had to the possession of lands or other property.

In shewing how subjection to any state may cease and determine, Puffendorf⁴ describes it as one mode, when a man by permission of his own commonwealth, voluntarily removes into the territories of another, and settles himself and his effects there, and the hopes of his future fortunes. But whether such per-

¹ pro L. Balbo.

² D. l. xlix. c. 15. l. 12. p. 9.

³ B. ii. c. 5. § 24.

⁴ On Civ. Gov. §. 118.

⁵ B. viii. c. 11.

mission generally exists or not, he refers to the municipal institutions of each country to determine: and this he holds to be the just criterion, even in the case of such who being of foreign birth associate themselves to any established commonwealth. Hence it may be inferred, that in the opinion of this writer, who made such deep researches into first principles, there is at least no repugnance to natural morality, in municipal laws, which, like those of Muscovy* lay a general restraint, or, like those of England, provide a specific mode to be occasionally used of preventing the migration of any one or more citizens.

The same author asserts, that, where there is a general licence of migration, those who remove ought in duty and honour to signify their projected departure, unless there is good reason to believe, that it will not be a matter of national concern. He maintains, that persons in employment ought to have the express consent of the ruling powers, whose territories they purpose to abandon: and he agrees with Grotius†, that we ought not, from principles of moral obligation, to desert and renounce our country, oppressed with public debts, involved in calamities, or threatened with invasion. But in one point they differ. Grotius affirms, that such migrations ought not, without the consent of government, to be made in companies very large and numerous, in as much as it is one thing to draw water out of a river, and another to divert the course of it: such dispeopling would be ruinous to the state, and defeat the ends of civil society: *and on moral occasions, what is necessary to obtain the end, has the force of law.* This sentiment, however, Puffendorf strenuously opposes, arguing, that what is lawful for one, is lawful for many; but with less shew of reason, for both this and the former points, in which they are unanimous, seem to stand on the same foundation, a due and conscientious regard to be had to the public safety and prosperity.

* Grot. b. ii. c. 5. §. 24.

† Ibid. b. ii. c. 1. §. 1.

I now recur to the definition of nations or states. Vattel¹ describes them to be bodies politic, or societies of men united together to procure their mutual safety and advantage by means of such their union. This account, however, will be thought, I apprehend, too comprehensive; for it might include every company of pirates, robbers, and banditti, associated on account of their crimes. The like is remarked by Cicero:² "*Quæ est enim civitas? omnifque conventus etiam ferorum et immanium? omnifque etiam fugitivorum ac latronum congregatio? unum in locum multitudo? certe negabis.*" The definition therefore given of a state by the sage and moral Grotius³, is, a complete or self-sufficient body of free persons, united together for their common benefit, to enjoy peaceably *their own rights, and to do right to foreigners*. What he calls a complete or self-sufficient body, (in Aristotle, "*αὐτάρκεια*,"⁴) may be thought to imply independence in regard to other nations, and thereby to distinguish such community from those inferior assemblages, which, within the limits of all or most countries, or within their empire and controul, have formed subordinate parts or appendages of the commonwealth, under the names of corporations, and other municipal societies unincorporated, colonies, and provinces. This quality however of independence is more fully marked by the character of doing right to foreigners, which, in its proper latitude, can be true only of a sovereign state. Such a community, Vattel⁵ observes, has its affairs and interests, it deliberates and takes resolutions in common, and thus becomes a moral person, having an understanding and a will peculiar to itself, and is susceptible of obligations and laws. Every state must, like individuals, be subject to certain rules, because it must answer the ends (which have been just mentioned) of its origin and first formation; and every end proposed implies the expediency of a certain line or means, by which it is to be attained. These rules (as it also hath appeared) may respect either other states, and are then called the

¹ Law of nat. prelim. §. 1. and b. i. c. 1. §. 1.

² Parad. iv.

³ B. i. c. 1. §. 14. and b. iii. c. 3. §. 2.

⁴ Law of nat. prelim. §. 2.

Law of Nations, or may relate separately to the one particular state, and are then termed *Civil or Municipal Law*. It is the latter which establishes the various relations of civil life, and accordingly regulates the conduct of the citizens towards each other. This must be done by precepts of general extent and influence, controlling the private judgments of individuals, which would often be erroneous, and always breed confusion, however upright their intentions. The necessity of rules infers the necessity of political superiors; and indeed some have begun their description of a state by calling it a conjunction of persons governing and governed; and others speak of the fitness of civil society and civil government as the same point to be demonstrated. "*Sine imperio* (says Cicero) *nec domus ullas, nec civitas, nec gens, nec hominum universum genus stare, nec rerum natura omnis, nec ipse mundus potest.*" On these principles it has been affirmed; that magistracy is by the law of nature, reason assuring men that they cannot well subsist without civil society, nor civil society without government.

THE several kinds of magistracy will be treated of in the next Lecture.

THE rules affecting this great relation of governors and subjects, especially such as constitute the legislative authority, are the fundamental laws, the primary part of internal polity: the other branch whereof respects the conduct of private citizens to each other, and will be chiefly kept in view in the sequel of the present disquisition.

THE necessity of adding to the supreme and primeval law of nature (treated of in the preceding Lecture) a system also of positive laws, will farther appear, by briefly considering them as divided into such as denote and punish crimes, and such as establish the rights of property.

¹ Pom. b. vii. c. 1.

² De leg. l. iii.

³ Bulst. 26.

To preclude the partial judgment of private sufferers, the public force must, in the prosecution of offenders, be directed by the public wisdom. The positive laws must accurately define the species of crimes, and their respective punishments. Thus, by explicit declarations, a more lively dread of temporal coercion is awakened, the consciences of brutish and inconsiderate men are more alarmed, and violence and wrong are more effectually restrained from annoying civil life.

THE same necessity of positive laws appears from viewing society in another light; that is, in regard to property. When the spontaneous produce of nature was found inadequate to the wants of any community, agriculture was rewarded with a permanent right in the improved soil. As men advanced in civilization, arts and commerce introduced, on the solid and rational foundation of common benefit to all, various other subjects of property. All these were to be regulated and modified by positive institutions. It was necessary not only to exempt them from intentional malice, fraud, and violence, but also to elucidate the several rights from honest doubts and scruples, and to determine inevitable litigations.

SOCIETY therefore induces a large accession of positive laws; all of which are available by consent. But this consent must be explained. Sometimes it refers to the general concurrence given or implied to the constitution of the legislative power; sometimes the people immediately, or by delegation, participate in that authority; and sometimes long and uniform custom bestows a sanction, as evidence of universal approbation and acquiescence. For in most countries, I believe, a distinction has been observed between laws expressly enacted, and such as are ratified by usage. The former are commonly reduced to writing; but may, like those of Lacedemon, be committed only to memory. Laws ratified by custom, are generally the most antient, and esteemed highly sacred, having been approved by the experience of ages. The Roman lawyer* there-

* D. l. i. s. 3. l. 32. p. 1.

fore, well enforces the principle, on which the authority of custom is grounded, who writes, "*Inveterata consuetudo pro lege non immerito custoditur. (et hoc est jus quod dicitur maxime constitutum.)*" Nam cum ipsæ leges nullā aliā ex causā nos teneant, quam quod iudicio populi receptæ sunt, merito et ea, quæ sine ullo scripto populus probavit, tenebunt omnes: nam quid interest, suffragio populus voluntatem suam declaret, an rebus ipsis et factis?

CUSTOMS are very frequently spoken of as unwritten law; although they have long ceased to depend solely on tradition and practical observation, being recorded in authentic testimonials. But they are so denominated, because their ratification is referred to the tacit consent of the people, and that for a long duration: whereas other laws are expressly declared at the time of their enactment.

WE are next led to inquire into the *subject matter* of positive or instituted laws; which in general may be said to be the actions of those for whom the laws are made. Civil ordinances therefore contain duties of moral and of positive obligation. By obedience to the former, the subjects must become better men as well as better citizens: the latter are founded in expedience. Whatever is just, is indeed inseparably connected with utility rightly understood. But some regulations are so far simply beneficial, that they have no antecedent enforcement in the system of morality. Hence civil laws have been called mixedly and merely human. The former are founded on some rule of that supreme law, rational or revealed, to which all men are essentially subject. Thus the laws which punish theft, or which provide for reparation of injuries, may be referred to the moral precept, *alterum non ledere*, although the modes be of men's invention. The laws merely human are such, for example, as those which determine the course in which inheritable estates shall be transmitted by descent.

* Puff. b. i. c. 6. §. 16.

* Hook. Recl. Pol. b. 2. §. 10.

to We are not however to imagine it practicable, that moral perfections can be enforced by civil sanctions. There are duties of piety, humanity, and fidelity, which must be, and always are, left to the influence of religion. This Puffendorf* very reasonably accounts for, as well " because the controversies " about them would be very perplexed and intricate, as to pre- " vent the multiplication of litigious suits, and also that the " good and virtuous might not be deprived of the most va- " luable part of their character, the doing well out of reve- " rence to their Creator, without regard to the fear of human " penalties; for this they must necessarily lose, when there is " no distinction made, whether a man doth well out of love to " virtue, or out of fear of punishment." Therefore avarice, ambition, hypocrisy, and many other vices, unless they pro- duce some external enormity, are unnoticed by human laws. The *Lex Julia de ambitu*,* among the Romans, extended only to those who, from ambitious motives, were guilty of bribery at elections, or some other open and flagrant act.

And here I shall venture to quote the expression of an author (who seldom deserves commendation) when he calls the law of nature the unwritten civil law; the meaning of which may be, that positive institutions, depending on the fundamental rules of general morality, look and tacitly hope for an unconstrained obedience to those rules, which it is not in their power to exact. But where the same writer measures right and wrong absolutely by positive ordinances; where he argues, that because men on their entrance into civil society bind themselves to obey the commands of the sovereign power, and thus being obliged to obedience before they know what will be com- manded, are therefore obliged universally and in every respect;

* B. viii. c. i. §. 1. and c. 3. §. 14.
 * Nihil enim fraudem curam, que super-
 rioribus legibus coercentur, formidatui sumus
 a magistratibus, si ab illorum creatione fran-
 dam omnem amovimus: ac ut publice guber-
 naculo deferamus ad meliores, justis, libris,

incorruptis comitis. Idem legem naturam uti-
 lissimam fuisse legem contra ambitionem latam.
 Quis enim argueret legibus fallacem principem?
 Hinc et de lege Julia (hæc scilicet de ambitu)
 satis leviter mentio est in digestis. Gravin. de
 legibus et senatus consultis, §. xviii.

here he plainly aims to subvert the foundations of morality. But the sophistry admits of a ready answer: for men do not enter into society with a view of superseding or disengaging themselves from the laws of nature; but the chief end of civil government, on the contrary, is, that those laws may be protected from violation, and secured by additional sanctions. When civil laws therefore grossly and manifestly contradict that supreme law, to which all men are essentially subject, such immoral or irreligious ordinances ought in conscience to be disobeyed. But in such cases we should receive the clearest and maturest conviction; and sometimes perhaps distrust our own rather than the public judgment.

ANOTHER caution may be inferred from what has been before observed, that where the civil laws lay no particular restraint, we are not always to interpret such silence into substantial permission, but only that the matter, being not proper for their interference, is left to the divine coercion.

As, however, we ought not to overthrow natural equity by consequences drawn from arbitrary institutions; so on the other hand we ought not always nor hastily to allege some general principle of moral duty, which may probably admit of restrictions and exceptions, in opposition to special provisions of municipal law. This notion at least has prevailed among very celebrated jurists; and is illustrated by the following example: That the author of any damage ought in conscience to repair it, is a general tenet of ethics. Now if we extend this rule to the case of a debtor, who makes default of payment at the time appointed, by means whereof the creditor sustains some extraordinary detriment, such application of the maxim is said to be unjust. The municipal law apportions the satisfaction by the regular computation of interest for the loan. To make debtors liable for such accidental damages, would breed endless

* V. Puff. b. viii. c. 1. §. 1, 2, 3 and ' Domat's Treatise of laws, c. xi. §. 16.
Hobbes there cited. *See further de* D. l. xix. l. 1. §. 1, 2, 3.

Civ. l. 14. §. 9. 10. & seq.
b. x. l. 6.

and

and intricate litigations. We must also recollect another rule of equity, That in general men should not be accountable for unforeseen contingencies. These observations, however, seem rather to denote what strict justice might demand, than what generous benevolence, with sufficient ability, might reasonably bestow.

CIVIL legislators have no rightful authority to forbid what the law of nature enjoins, or to enjoin what that forbids. But they may lay an interdict on things *permitted* only by the law of nature. They may retrench natural liberty by creating an accession of positive duties. It is the opinion of the celebrated Commentator on the Laws of England, that such civil institutions affect the conscience with an obligation only of submitting to the penalty if levied: which general assertion he illustrates* from those provisions in this country which are usually denominated the game laws.† It may be very just in this singular case to consider the prohibition as *merely conditional*, either to forbear, or to pay the mulct: for no right of property seems invaded, nor the welfare of the community disturbed. It might however be difficult to find an instance parallel to the foregoing. Obedience to all such laws as are not, according to the intention of the authors thereof, *conditional*, though merely positive, tends to the good of the society, which it is the duty of every citizen to promote, in return for the common protection afforded, and because of the moral necessity he is under to fulfil his compacts and engagements, and consequently to obey whatever is ordained by the supreme legislature, not being contrary to the divine law of reason and religion.

GENERALLY also the political expedience of the positive law is manifest. Where, for example, the positive regulations, enacted to improve the public trade, revenues, and manufac-

* Black. Comm. introd. §. 2.

† V. Puff. b. viii. c. 1. §. 1. and c. 3. §. 4. Grot. b. ii. c. 2. §. 5.

tures, are violated and scorned, that nation is evidently interested in the transgression. Here, then, I apprehend it is not sufficient to discharge the conscience, to be ready to satisfy the penalty on detection. Thus also every citizen ought, according to his ability, to benefit the society of which he is a member. If, according to the laws of his country, he is appointed to a burthenfome, but necessary, office, amid the various capacities of civil life, there is a duty (I do not say how strong) of serving it. To pay the fine falls short of the obligation, unless where the intention of the lawgiver is, according to the former distinction, merely conditional; or where the person appointed has a just, not a self-indulgent, pretext for exoneration. Thus moral and civil duty are in general inseparably interwoven, though differing both in nature and degree.

HAVING thus far treated of the subject matter of civil laws, I shall next consider them as consisting of two essential parts; namely, the definitive, declaring what things are to be done or forbore; and the sanction, either generally or specifically ordaining the consequence.

THE sanction of civil laws, it is well known, much oftener consists in punishment than reward: for which the learned and sagacious Puffendorf¹ mentions two reasons; first, because the secure enjoyment of natural and civil rights of itself largely compensates obedience; secondly, because if particular remunerations were bestowed, no stock would be sufficient for so profuse a bounty. This reasoning has its weight: but the fact, as to the occasion of it, may be more obviously accounted for. Legislators expect that there may be some transgressors; but that the bulk of their subjects will conform to their institutions: if all the obedient were to receive reward, judicial business would be the general occupation of mankind.

It has also been remarked, that the infliction of evil is more operative than the possession of good. This perhaps, as to the

¹ B. i. c. 6. §. 14.

disposition of most men, may be true; but it does not immediately follow, that the terrors of one are more efficacious than the allurements of the other, when both are at an equal distance, and in some degree of uncertainty. Present uneasiness, the forcible stimulator of the will, may be occasioned as well by the absence or privation of some desired object, proposed for the reward of obedience, as by the terror of impending vengeance, threatened for the punishment of transgression*. The compulsory quality therefore of human laws, or, more properly speaking, the moral necessity of complying with them, may be produced by menaced punishment or proffered reward†. Each of them at different seasons actuates the will.

THE virtual effects of law (as Modestinus** writes) are to injoin, to forbid, to permit, and to punish. Where the laws are silent, and where they are express, permission is equally to be ascribed to them, as to matters not restrained by the rules of natural morality and religion. Nor is there any want of obligatory force in such cases. For what the laws permit me to do or enjoy, they virtually prohibit others from obstructing, on the peril of their disobedience. In all these things we may trace and respect the conduct of legislators; as the character of private individuals also is marked by what they do, and what they abstain from doing. Where there are but few restraints in matters permitted by the law of nature, and a moderate accession only of positive duties, there legal liberty abounds, and there legislators have executed their important trust with mildness and reserve.

So far as civil laws, in regard either to their subject matter or their sanction, are merely positive, so far they are justly liable to variation, and ought in some measure to be adapted to the exigence of the times, and the dispositions of the people***.

* V. Locke on Hum. Und. b. ii. c. 21.

† Puff. b. i. c. 6. §. 15. Barb. comm. ibidi.

‡ Puff. b. i. c. 6. §. 14. ad fin. Taylor's civ. law, c. law and right.

*** Grot. prolegom. §. 5.

§ D. l. i. t. §. 1. 7.

varia pro moribus, et apud eosdem pro temporibus saepe mutata.

To discern the fitness of political institutions, is the noblest exertion of human prudence¹, and has of old been thought the most necessary occasion of imploring the co-operation of divine assistance. Hence the Pagans of every country deified their legislators; and hence that device of ancient Mythologists, recited by Plato², was framed to shew, that it requires a nature more than human, to regulate perfectly the establishment and well-being of civil society. Another passage of the same genuine philosopher may more immediately interest our attention, where he admonishes the founders of states in the first place to invoke the Deity, that he would be present, and propitious to their undertakings—“*συνδιακομησων την τε πολιν και τους νομους.*” The religious duty prescribed by this Athenian theologist, is exactly what is performed in the British Senate, before the important deliberations of the day begin.

THE most requisite *qualities* of civil institutions are, that they be conformable to the moral law; that they speak a general language, exempt from partial discriminations; and that they chiefly respect the welfare of the whole community. The laws should observe equality; nor would any man wish a greater indulgence than they allow, on condition that the same licence were extended to others. This consideration shews the true character and usefulness of civil restraints.

It is very obvious, that all new institutes ought to be properly *promulgated*; which is the more necessary, since it is an established doctrine, at least in this country, that ignorance of the law does not excuse men from its coercion. It is to be wished, therefore, that a due method could be devised of apprizing men (particularly the inferior class) not only of recent statutes, but of such other general heads of the law, as are most important to be known. If this was done, by reading or exhi-

¹ Hook. Eccl. Pol. B. I. §. 16. marg. ² De leg. l. iv.

biting them in places of divine worship, it might add to the veneration due to our legal polity, more especially to those provisions, which are enacted to promote the precepts of natural morality.

ANOTHER maxim of legislation is, That the laws be few in number. This rule is not of equal validity, as to all branches of municipal institutions; but it chiefly respects the criminal code. A multitude of penal laws may be difficult to be remembered, reconciled, or understood.

LASTLY, The laws should have stability. Frequent changes and innovations lessen the respect due to them, in like manner as unsteadiness of conduct brings men into disesteem.

I PROCEED now to the methods of interpreting civil laws; which are either merely intrinsic, taken from the words, context, and subject matter; or derived from considerations more remote. Thus, among the latter, custom has great weight: "*Optima est legum interpretatio consuetudo*," is a maxim both of English and Roman jurisprudence. It is material also to enquire how an ordinance was understood at the time of passing it: for we are often told in the writings of Lord Coke, that "*contemporanea expositio est fortissima in lege*." Another maxim of the Digests may very justly be attended to, "that *in toto jure generi per speciem derogatur, et illud potissimum habetur, quod ad speciem directum est*." The meaning of which is, that, when the law descends to particulars, such more special provisions must be understood as exceptions to any general rules laid down to the contrary; and the general rules must not (*vice versa*) be alleged in confutation of the special provisions. This notion also of the Civilians is adopted by us, as conveyed in the following uncouth expressions: "*generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa*." But

¹ Tayl. civ. law, p. 172.

² Summ. Rom. law, pp. 73, 74, 75, in the notes. Puff. b. vii. c. 9. §. 5.

³ 1 Inst. 12.

⁴ D. l. l. t. 3. l. 37.

⁵ 2 Inst. 11. 136. 4 Inst. 138.

⁶ D. l. l. t. 17. l. 20.

⁷ 3 Rep. 112, b.

the principal rule of interpretation is the reason of the law. Herein we must be careful to regard comprehensive, not partial, principles of equity; not such as are only applicable to, or derived from, the very singular concurrence of complicated circumstances in the case to be solved. This would be wandering in an endless labyrinth; and would banish certainty from judicial decisions. We must weigh the evil to be redressed, the remedy and relief to be promoted, and sometimes the consequences of determination on one side or the other, as they may affect individuals and the public. For the end of civil laws in general being the welfare of the community, the same must be had in view in establishing their construction. "*Omnes leges ad commodum reipublicæ referri oportet, et eas ex utilitate communi, non ex scriptione, quæ in literis est, interpretari.*"

The last general consideration to be mentioned in respect to civil laws, is the *period of their existence*. They may then be repealed, either expressly, or by implication, founded on disuse. "*Rectissime etiam illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.*" It certainly requires very strong grounds to presume a law obsolete. Yet as the whole community includes as well the legislative power as its subjects, the total disuse of any civil institution for ages past, may afford just and rational objections against enforcing the disrespected and superannuated ordinance.

THESE observations may contribute to form a general idea of civil, positive, or instituted law.

* Cic. de Inv. l. i. c. 38.

* D. l. i. t. 3. l. 32. p. 1.

The principal rule of interpretation is that the law should be construed in favor of liberty. This rule is derived from the very nature of the law, which is to regulate the conduct of men in society. It is not to be understood that the law is to be construed in favor of liberty in every case, but only in those cases where the law is ambiguous or doubtful. In such cases, the law should be construed in favor of liberty, because liberty is the natural right of every man, and the law is only to be used to regulate the exercise of that right. The law should not be used to take away liberty, but only to regulate its exercise. This rule is also derived from the fact that the law is made by men, and men are fallible. Therefore, the law should be construed in favor of liberty, because it is more likely that the law is intended to regulate liberty than to take it away.

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LECTURE THE THIRD.

OF THE SEVERAL SPECIES OF MAGISTRACY.

Magistratibus igitur opus est: sine quorum prudentia ac diligentia esse civitas non potest: quorum descriptione omnis reipublica moderatio continetur.

Nec verò solùm ut obtemperent obedientque magistratibus, sed etiam ut eos colant diligentque præscribimus: ut Charondas in suis fecit legibus.

"Justa imperia sunt, iisque cives modeste ac sine recusatione parento."

Cic. de leg. iii.

LECTURE THE THIRD

OF THE FEDERAL SPECIES OF MAGISTRACY

Magistrate is that officer of the law who is authorized to administer the law in the name of the people, and to execute the law in the name of the people.

The first duty of a magistrate is to preserve the peace and to execute the law in the name of the people.

The second duty of a magistrate is to administer the law in the name of the people.

theory, as created by the whole people. It is therefore more natural to contemplate the conditions respectively of law.

body, as it had been then declared, and is the inviolable form of system of government by which our natural and acquired rights are to be protected and obtained.

LECTURE THE THIRD.

of the several species of magistracy. The nature of the magistracy must be distinguished from the rest, as to continue two contracting parties. The nature of the magistracy must be distinguished from the rest, as to continue two contracting parties.

OF THE SEVERAL SPECIES OF MAGISTRACY.

of magistracy. When they are to be selected, they may be selected upon a contracting party with their future subjects. But with respect to the office of the magistracy, it is a public office, in that, the essence of the magistracy is a public office, in that, the essence of the magistracy is a public office.

THE Roman jurists, and their followers, include under the phrase *jus publicum*, as well the laws which regulate the intercourse of nations with each other, as that system of internal polity, which, with respect to any people, separately considered, determines in what hands the public dominion shall be lodged, and how in general it shall be exerted; or, as Vattel expresses it, the establishment of the order, in which a nation proposes to labour in common, for obtaining those advantages, with a view to which the political society was framed.

This latter branch is by some modern writers treated of under the name of the fundamental laws. The Professor Burlamaqui, indeed tells us, they are improperly so called, for they are real covenants. Yet, with due deference to his opinion, the fundamental principles of any constitution have much more of the nature of a tacit law than of an implied agreement between party and party. This celebrated writer seems to suppose governors, as a contracting party, at the commencement of civil society, engaging not to abuse their great trust. But in effect their offices must be considered, if we pursue the common

^a Byuk. 2. j. p. ad LeBorm.

^b Law of nat. b. i. c. 3.

^c Pol. law, p. i. c. 7.

theory, as *created* by the whole people. It is therefore more natural to contemplate the conditions respectively of superiority and subjection, proceeding, as a law, from the collective body, as if it had been then declared; this is the inviolable form or system of government, by which our natural and acquired rights are to be protected and advanced.

The choice of the form of government must be reputed as the act of the whole people, because antecedently thereto no part of the community is so distinguished from the rest, as to constitute two contracting parties. The nature of the magistracy must, in theory, be considered as determined upon before the personal selection of magistrates. When they are so selected, they may justly be looked upon as contracting with their future subjects, for the due discharge of their functions. But what those functions shall be, in short, the essence of the constitution, is a previous matter, it is to be esteemed the act of the people conjointly and indiscriminately; for which reasons there seems no impropriety in the expression of fundamental laws.

WHETHER, however, we consider these essential principles as covenants or as laws, the theory equally proceeds on the necessity of general consent, positively or virtually given; though scarce any government, perhaps, was ever founded on an express delegation of authority from the persons to be governed. Besides which, changes are gradually and imperceptibly introduced, which, deriving a sanction from time and universal acquiescence, are matured into fundamental laws, or principles of the constitution. For complete systems of polity cannot with any probability be referred back to the first formation of any particular commonwealth. At such time some general ideas only of political fitness could be entertained; as, that the moral justice of every act of power must be regarded preferably to supposed utility; and that, where questions of comparative expedience are allowed to have place, the separate interest of any individual is to be postponed to the common welfare of the state. Since history and reason alike teach us, that

the

the finished fabric of a well-ordered constitution is to be the work of succeeding generations, and gradually to be improved by progressive experience.

THIS description, with these limitations, may shew what is to be understood by those fundamental rules or laws, forming a sort of cement, which holds a nation together, and enables it to act in a joint capacity, clearly and widely distinguished from an unconnected, unaffiliated multitude.

THE complex power thus erected, may and must be distributed into different spheres of activity.

WE are led, therefore, to investigate the several species of civil dominion.

PUBLIC or Political Power, then, seems properly reducible to three kinds, Legislative, Executive, and Judicial. The distinct and characteristic nature of these magistracies will be severally treated of in the remainder of the present lecture.

I. THE giving of laws to a people forms the most exalted degree of human sovereignty; and is perhaps in effect, or in strict propriety of speech, the only truly supreme power of the state.

THE right of exercising legislative dominion seems generally allowed to be founded on consent: "without which (the admirable author of Ecclesiastical Polity* observes) there were no reason that one man should take upon him to be lord or judge over another; because, although there be, according to the opinion of some very great and judicious men, a kind of natural right in the noble, wise, and virtuous, to govern them which are of servile disposition, nevertheless for manifestation of this their right, and men's more peaceable contentment on both sides, the assent of them who are to be governed seemeth ne-

* Bell, Delin. Univ. law, 56.

* B. i. §. 10.

“cessary.” For it must be remembered, that in a supposed theoretical state of nature, all men, as Puffendorf¹ at large insists, are to be reputed equal. This commonly received opinion is not, I believe, always sufficiently understood. Some men in every age, as Hooker intimates, must have outshone the generality of their contemporaries in corporal and mental advantages, in knowledge, wisdom, and virtue. Such superior qualifications, for ruling over others, afford an additional argument to what I have alleged in the preceding lecture, shewing that government, abstractedly considered, is founded on the law of nature; in other words, that the existence of political power is the will and ordinance of our supreme Creator. Consequently civil obedience is a general duty of conscience and religion. Eminent talents may also, at the formation of some political constitutions, have directed men in the disposal of power and pre-eminence. Such disposal thereof by common consent (testified or presumed from usage and acquiescence) at the same time modifies the authority, and establishes the right of the civil potentate.—But to recur to the assertion, that all men are by nature equal: the meaning thereof is this; that they have all the same natural rights, are all subject to the same natural obligations, alike morally restrained from committing wrong, and morally bound to perform acts of beneficence. Thus the natural equality of mankind is a ground-work of the general rules of justice; and thus to maintain that no man has naturally a right of empire over others, is but an exemplification of the larger position. Hooker² therefore, affixing the necessity of common consent to the creation of legislative authority in particular, proceeds thus: “that which we spake before concerning the
 “power of government, must here be applied unto the power
 “of making laws whereby to govern; which power God hath
 “over all; and by the natural law, whereunto he hath made
 “all subject, the lawful power of making laws, to command
 “whole politic societies of men, belongeth so properly unto the
 “same intire societies, that for any prince or potentate, of what
 “kind soever upon earth, to exercise the same of himself, and

¹ L. of n. and n. b. iii. c. 2.² Same sect.

“not

“not either by express commission immediately and personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws, it is no better than mere tyranny.” Such is the unequivocal language of that admirable author; whom most political writers, though differing in opinion among themselves, respectfully look up to, and eagerly cite in support of their own several persuasions.

THE evidence however or demonstration of such consent having been given, must in general depend on the long acquiescence of a people under their established form of government. The original of nations is obscure: and if we could clearly review the age, in which a state began to assume civil relations, we could hardly expect to find any positive declaration creating the mode of the constitution. At such an unlettered period, it is probable, the distinct powers of making, of executing, and of interpreting laws were unthought of, or unattended to: and that the early inhabitants of the same district, finding the inconvenience of suffering individuals to determine, or rather to vindicate, their own causes, invested some patriarchal sage with undefined authority, who decided controversies by his sense perhaps of traditional maxims, or by his mere discretion. Thus the dominion first exercised in most territories, seems to have been of the judicial kind^b. The theory may be supported by a striking historical event. For the people of Media^a, not before subject, as it seems, to any regular form of government, chose Deioces for their first king, who had signalized his equity and wisdom amongst them as a judge, or common arbitrator of their differences, and thus ascended from the tribunal to the throne.

WHEN partiality on the one hand, and a pretended ignorance of duty on the other, had demonstrated the utility of a known or written code, legislative authority began, as a distinct power, to display a visible influence. The first institutes probably

^a *Crag. jus feud. l. i. dig. 1.*

^b *Herod. l. i. Prid. conn. vol. i. p. 25.*

were enacted in small territories by common consent; in large domains, the monarch issued his despotic edicts; and in all countries, time, and acquiescence, rather than express commission, gave a sanction to the power of legislation. In this manner, for the most part, different constitutions of government arose in different nations, and were gradually established on the tacit consent of the community. Perhaps too, when great changes and revolutions have been suddenly effected, some duration of quiet and general approbation may even in these cases be wanting or expedient, if not to corroborate them in point of moral and political right or justice, at least to testify the justice of them to mankind.

THE respective excellencies of the three simple forms of government (Monarchy, Aristocracy, and Democracy) have been discussed in different ages by various other disputants besides those recorded by Xenophon. I shall here mention two opinions in relation to this subject, which, though of extensive prevalence, may yet be reasonably doubted, if not easily confuted.

THE favourers of unlimited monarchy, and indeed others too, assert, that no establishment can be happier, when the prince is wise and virtuous;

*Nunquam libertas gratior extat
Quam sub Rege pio.*

AGAINST this opinion, the forcible expression of Aristotle¹ is justly levelled, “*αὐτὸν οὐκ ἔστιν νόμος ὁ νόμος*,”—“the spirit of the law is exempt from human passions and affections.” For these men place political happiness or liberty in casual and precarious enjoyment, depending on the present will of the sovereign, subject to his possible mutability of temper and other infirmities, exposed to insidious arts, and disturbed at least with

¹Politie, l. iii. c. 16.

the dread, that a Titus may be succeeded by a Domitian. Whereas there only is liberty, where it is fortified by legal securities; where it is possessed, not *ex gratia* from the prince, but *ex debito* from the constitution; where it not only escapes violation, but is set above disparagement and indignity.

THE other opinion also is not uncommonly received, though at least very doubtful, namely, that Monarchy is preferable to Aristocracy, where both are abused; in other words, that it is better to have one than a plurality of tyrants. This latter mode of speaking is what seems to have seduced men into such sentiment. The following expressions of the President Montesquieu may tend to make us of the contrary persuasion; "The number of magistrates (says he) sometimes moderates the power of the magistracy; the whole body of the nobles do not always concur in the same design; and different tribunals are erected which temper each other." We may add, that if a subject finds an oppressor in one of his superiors, in another he may experience a patron and benefactor, to protect from injustice, and to make the cause of the sufferer his own. At the worst, tyrannical oligarchies are not likely to be of long duration. An elective, and well-constituted aristocracy is, in Burlamaqui's opinion, the most perfect of the simple forms. The brutality and ignorance of the vulgar, the tumults of crowded assemblies, and the impracticability of summoning to council the inhabitants of extensive regions, disqualify the people at large from any share of government, except in elections; as to which exercise of power, a moderate degree of capacity, with good intentions, may avail. Upon the whole, it seems agreed by many rational inquirers, not of this only, but of foreign nations, that the mixed constitution of Britain is far preferable to any of the simple forms, or other model hitherto devised.

Every free constitution, however, presupposes a due portion of public virtue, without which the fundamental laws are of

^a Sp. of laws, b. xi. c. 6.

^a Pol. law, p. ii. c. 2.

little or no energy or avail. If a nation should sink, like ancient Rome, into irretrievable corruption, it is hard to determine what would be the best form of government for such a people, with respect to their internal and domestic welfare; but there is no hazardous boldness in pronouncing, that absolute monarchy is the aptest means of promoting their external security, grandeur, and renown.

A QUESTION, of perhaps equal importance, is that concerning the *bounds or limits* of legislative power.

It is certain, no human authority can rightfully infringe or abrogate the smallest particle of natural or divine law; yet a British judge*, of highly-deserved estimation, seems in some measure unguarded in asserting from the bench, that "an act of parliament made against natural equity, as to constitute a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*." The same position was indeed afterwards defended and maintained by Lord Chief Justice Holt. The principle is infallibly true; the application of it, and the conclusion, dangerous. We must distinguish between right and power, between moral fitness and political authority. We cannot expect that all acts of legislators will, or can be entirely good, ethically perfect; but if their proceedings are to be decided upon by their subjects, government and subordination cease. If the magistrate should injoin any thing by his authority, that appears unlawful to the conscience of a private person, Locke's† philosophical advice is, that such a private person is to abstain from the action that he judges unlawful, and he is to undergo the punishment, which it is not unlawful for him to bear. In like manner, when the supreme power decrees any thing injurious to one or a few only of its subjects, it is their duty, according to the principles inculcated in that admirable dialogue of Plato, intitled *Crito*, to acquiesce, and not to disturb the peace of society, nor attempt

* Hob. 87.

† 12 Mod. 687.

‡ V. ii. 249.

to subvert the constitution of their country, or diminish the veneration of its laws, which would be bringing a greater evil upon the whole community.

LEGISLATIVE authority seems, in a similar sense, to comprehend matters of religion. "*Jus publicum etiam consistit in sacris.*" "The parliament (says Hooker) is a court, not so merely temporal, as if it might meddle with nothing but "only leather and wool;" as if its deliberations were to be confined to the increase of trade, and improvement of manufactures. It may indeed be true, as Locke's opinion is, that the legislative power should generally direct its operations to the temporal good and outward prosperity of the society, as the ends more immediately corresponding to its institution. Yet the authors of laws for the furtherance of divine worship must be supposed to act from a concern for the eternal felicity of themselves and their subjects, and not merely because religion is serviceable to the state; unless we can believe that those who established the Reformation, by the five several acts of uniformity, expelled Popery as a political evil, without any regard to its corrupt innovations in Christianity.

THE power of legislatures in matters of religion is very ably maintained and illustrated by the Professor Burlamaqui, in his Rudimental Treatise of Politic Law.

THE doubts which have arisen are, according to the sagacious Bynkershoëk "de religione jam constituta;" for he adds, "de constituenda autem et verum est et utile, eum, qui rerum civilium imperio potitur, etiam sacrorum esse potentem." This distinction perhaps arose from the form of expression, *jus publicum consistit in sacris*, by which a civilian or canonist might mean, not only that positive laws interfere in matters of religion, but

¹ D. l. i. t. i. le. 1. p. 2. — Bynk. Q. j. p. l. ii. c. 18. — Dom. treat. of laws, c. x. §. 12.

² Eccl. Pol. b. viii. t. ult. in prin.

³ V. ii. 249.

⁴ Collected in the inauguration service.

⁵ Q. j. p. l. ii. c. 18.

⁶ V. Corp. jur. can. in prin.

also that such laws are a part of the constitutional polity; and because the constitution or fundamental laws cannot, therefore these laws *de religione jam constituta* cannot admit of alteration. But many branches of internal polity, which (though widely differing from the fundamental laws or constitution itself) a Roman jurist would refer to the *jus publicum*, are both instituted, and from time to time amended, by civil legislatures. We may therefore ask, if the supreme power of the state may ordain sacred things, why can it not regulate and reform them? if it may build, shall it not repair?

In this kingdom particularly, the ordering of ecclesiastical persons and things, as it ought to be a principal concern, and in fact has been constantly exercised from the remotest ages, so it has been generally allowed in all times the rightful prerogative of the common legislature. This is that "*lex justissima*" (mentioned on another occasion by our first King Edward after the conquest) "*ut quod omnes tangit, ab omnibus approbetur.*" The king's power, therefore, of spiritual dominion is described by the judicious Hooker (an epithet as constantly appropriated to him as those of Homer to his chiefs) to be "that ruling authority, which neither any foreign state, nor yet any part of that politic body at home, wherein the same is established, can lawfully overrule;" intimating the distinction between the royal prerogative in matters ecclesiastical, for the enforcement of the laws in being, and the authority of the whole legislature, which alone can enact new laws. Those indeed who doubt of the parliament's authority to interfere in matters of the church, by reason of supposed inability and inexperience in sacred things, seem not to advert to a distinction before noticed, and necessary to be attended to on the present as on many political questions, between the immutable rules of moral right and wrong, and mere constitutional power. In framing all laws, the judgment of those is to be regarded, who are most conversant about the subjects of them. So in matters of faith and

* Dugd. Summon.

* Eccl. Pol. 443.

worship.

worship, to slight the admonitions of our spiritual guides, would be a conduct in the British senate neither to be justified nor expected. But still it is the general consent, as Hooker^a uniformly contends, which gives to an ecclesiastical, as well as any other ordinance, the vigor of a law.

HITHERTO, therefore, we can discover no assignable bounds to legislative authority, considered abstractedly from the mere moral right of its proceedings. The case is materially varied, when we conceive government acting on itself, or attempting to nullify its own essential constitution. An occurrence, wearing in some degree a similar aspect, happened in this country, when an act of parliament^b (the *lex regia* of England) was passed to give the king's proclamations, under some restrictions, the force of statutes. If legislators may transfer their authority, building up a novel government on the abolition of their own, it is mere trifling to refer the original right of legislation to national consent, explained, for the most part, by long acquiescence. The question is, whether any legislature can essentially and avowedly demolish the constitution? I speak not of doubtful innovations or abuses, where perhaps it might be reasonably objected, who is to judge of their progress or effect. But I am considering laws made and promulgated by a new government, openly asserted, after its erection by the self-dissolved powers, and of institutes enacted under the colour of such change, and preposterous assignment of dominion. If indeed the old stile of authority be used, if constitutional power be surreptitiously or violently usurped, the constitution may remain: so also the ends of all magistracy may be perverted; yet few perhaps will in this respect subscribe to Locke's opinion, that such instances invariably amount to a dissolution of the government. To these cases however the reasoning is not directed. But what can give a sanction to the total and undisguised alienation of legislative power, since this highest of functions is in the nature of a trust? The sanctity of their fundamental polity

^a Eccl. Pol. 87, 88. 459.

^b St. 31. Hen. VIII. c. 8.

^c On civ. gov. c. 19.

was carried so far by the Athenians*, that their γραφή παρανομίας, or accusation against any one, who should even propose a law inconsistent with the constitution, was attended with severe penalties on the bold innovator. I will add the opinion of a modern writer, which perhaps may have more weight; Vattel*, a jurist of a clear and capacious understanding, and in the councils of an arbitrary court, argues against such right of legislators to subvert the fundamental laws, "in as much as nothing leads us to think that the society was willing to submit the constitution itself to their pleasure. In short (says he) they derive their power from the constitution, how then can they change it, without destroying the foundation of their authority?" Yet, on the other hand, he expresses his opinion, that if our houses of parliament were to enter into a debate on suppressing themselves, and investing the king with the full and absolute government, and the whole nation were voluntarily silent on such extraordinary procedure, this would amount, in his construction, to the people's approbation of that act of their representatives.

II. HAVING thus far attempted to explain the general nature of Legislative Authority, I proceed to treat in a more cursory manner of the Executive Power. To ordain, is evidently an exertion of more eminent dominion, than to expedite the things ordained. But though executive power, considered abstractedly as such, is a less august authority than that which I have at large described; yet the person intrusted with it may, and ought, also to have a necessary voice in making laws. Such participation of legislative power is essential to maintain the high dignity of the supreme executive magistrate, and to secure the obedience and reverence of his subjects.

In the early ages of the world we read chiefly of kings invested with absolute sway, or whose power at least was controlled by very few known and established limitations. Hence

* Tayl. civ. law. 164.

* Law of nat. b. i. c. 3.

some have thought the same extent of dominion implied in the very nature of regal government. But here I may adopt the language of an author^a, who always meets with merited respect.

“ Many of the antients (says he) in their writings, speak of
 “ kings with such high and ample terms, as if, universality of
 “ power, even in regard of things and not of persons, did ap-
 “ pertain to the very being of a king: the reason is, because
 “ their speech concerning kings, they frame according to the
 “ state of those monarchs, to whom unlimited authority was
 “ given; which some not observing, imagine that all kings,
 “ even in that they are kings, ought to have whatsoever power
 “ they judge any sovereign ruler lawfully to have enjoyed. But
 “ the most judicious philosopher^b, whose eye scarce any thing
 “ did escape, which was to be found in the bosom of nature,
 “ he considering how far the power of one sovereign ruler may
 “ be different from another regal authority, noteth in Spartan
 “ kings, that of all others they were most tied to law, and so
 “ the most restrained power.” And surely the whole of the pa-
 triarchal system of politics, or no part of it, must be true. If
 kings do not reign by a sacred, divine, and indefeasible right of
 succession; if on the contrary the families from which they are
 to spring, and the canons of hereditary descent, may be law-
 fully ordained by the positive constitutions of different coun-
 tries, it must be equally lawful to prescribe the conditions of
 sovereignty, and the limits of regal, as well as any other
 power.

The legislative and executive sovereignties should be care-
 fully kept distinct, except as to such participation of power, as I
 have before prescribed. For if they were intrusted indiscrimi-
 nately to the same rulers^c, they might advance an interest of
 their own, detached from that of the community, and from the
 ends of civil association, having a view, both in the framing
 and executing of laws, to their own peculiar aggrandizement.

^a Hook. Eccl. Pol. 446. ^b Pythag. cited in the margin. ^c Locke on civ. gov. c. 12.

But



But there is much less dread of oppressive institutions, where those who are convoked to enact laws, are to be separated as soon as they have accomplished this duty, and to become private citizens again, subject, in common with others, to the ordinances they have made. For it is not necessary, that legislators should be constantly assembled, establishing new provisions: although the vigilance and activity of executive power must be incessantly engaged.

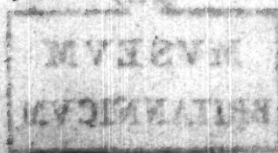
It is also observable, that laws conceived in general terms may refer many things, as persons, time, place, or manner, to the discretion of the executive magistrate. Thus it may be a fundamental rule of polity, that national councils shall frequently, or on urgent occasions, be assembled; but when or where in particular, may be left to the executive power to determine. So too the public affairs must be conducted in various departments of the state. But the disposal of old, and a limited right of creating new employments, may properly belong to the executive sovereign, this delegation of authority to fit substitutes comprizing indeed great part of his exalted function. Wherefore Aristotle¹ divided the administration of government into three parts; consultation about public affairs, the establishment of magistrates, and judgments.

OTHERS^{*} mention fiscal magistracy as a separate branch of civil power: which seems a superfluous distinction. Laws of revenue and taxation must be made by the same authority as all others: to administer them when made, is the office of the executive magistrate: though indeed, in constitutions like ours, the mismanagement of the public treasure may more peculiarly become matter of complaint in assemblies representing the body of a people, whose dissipated wealth is made the subject of accusation.

FARTHER, it is one great end of civil society, that the public force may be collectively employed against foreign ene-

¹ Grot. de j. b. & p. l. i. c. 3. §. 6.

^{*} Bell. delin. univ. law.



mies, for the national defence and emolument. The occasional exertion of a country's strength may suitably appertain to the executive magistrate; whose authority, constantly subsisting, is alike prepared to resent hostilities, and to conclude treaties of peace and commerce. This is sometimes called fecial, and sometimes federative, authority, but more usually the power of peace and war. Where it is lodged in the hands of a single person, such sovereign has all the advantages of unlimited monarchies in respect to secrecy and dispatch, which in military enterprizes so often contribute to prosperous success: while his subjects, from a sense of their interest and importance in the commonwealth, and a love of their country's constitution, have the martial ardour of freemen, whose victories are so much their own.

ANOTHER advantage of lodging this fecial power in a single magistrate is, that it renders the leagues and treaties so made more firm and sacred: because¹ when one person only engages his faith, he is struck with a more conscientious concern for the observance of it, than can be supposed to affect each man in a multitude, as in popular governments; where every one is likely to consider, that but a small portion of the national faith and honour is intrusted to his care; which proportionably lessens his anxiety about receding from public compacts.

It is not inconsistent² with the character of a supreme executive magistrate, to bind himself, at his accession, by engagements respecting the exercise of his power. If he afterwards violates his general duty, his advisers and instruments are properly amenable to national justice. The executive power may indeed be forfeitable in certain cases by positive laws; which ought fully to provide the remedy, as well as declare the mischief; as that if a sovereign shall³ profess an abjured religion, the next heir shall ascend the throne. But to suppose possible

¹ *Labardie de rebus Gallicis*, b. vi. p. 329.—King's Speech, 28 May, 1677.

² Grot. l. i. c. 3. §. 16.

³ St. 1 W. and M. sess. 2. c. 2. §. 9.

occurrences, where the laws are silent, may appear a dangerous and culpable indecency.

III. LASTLY, The judicial power of the state, which hath the ordinary interpretation of the laws, is, in its essential nature, distinct from the executive; though that may, without any political incongruity, nominate the persons who are to sit in judgment. I have before remarked, that the species of civil authority first exercised among men was probably of the judicial kind. Controversies left to the litigants themselves, usually ended in force; and it was soon found* expedient, before laws were enacted, to resort to some reputedly wise and impartial arbitrator. When afterwards positive institutions were framed, the same reasoning gave judicial power to men disinterested in the event. It then became the duty of those invested with this high character, to scrutinise the true and just interpretation of the established code. After such rational improvement in polity, this magistracy included in it less of empire and command, than the legislative or executive; but from its importance, and the qualities essential to the due discharge of it, hath suffered little, if any, abatement of its pristine dignity. Mere questions of doubtful facts may, in general, be decided by ordinary capacities: and here in England, they are very rarely, at least by our early polity, the province of the judicial magistrate. But that is a small exoneration. In all highly civilized, free, and commercial countries, a due performance of the judicial office must require a conspicuous degree of natural sagacity, improved by studious researches; while the difficulties arising from the apparent opposition of one rule to another, from the easy misapplication of maxims conveyed in general terms, or from the supposed repugnance of a principle of equity to the literal meaning of a positive law, exercise the tribunals in intricate and increasing litigations. The importance of the task, and the splendor of the necessary qualifications, concur in bestowing a sanctity on the persons of judges, and veneration on their decisions. "*Religiosum est*

* Crag. j. f. l. i. dieg. 1.

" (says

" (says Cicero) *quod jurati legibus judicant.*" Neither is the estimation of this magistracy abated or impaired even by its being familiarized, in the display of its functions, to the daily inspection of the populace. A certain awefulness seems naturally and inseparably to attend the exercise of judicial power.

SUCH are the distinct authorities, or species of magistracy, that regulate civil society.

De Lav. l. i.

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LECTURE THE FOURTH.

OF THE LAW OF NATIONS.

*Ne quod toto orbe terrarum injustum imperium sit, et ubique JUS, FAS,
LEX, potentissima sint. Liv. l. xxxiii. c. 33.*

LECTURE THE FOURTH

OF THE LAW OF NATIONS

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LECTURE THE FOURTH.

OF THE LAW OF NATIONS.

HAVING in the last Lecture discoursed on that part of public law, which (according to the division made by the Roman jurists and their followers) respects the constitutional government or internal polity of states, I proceed to the other branch, which regulates the commerce of nations one with another.

THEIR conduct may be mutually beneficial or injurious: and is in all respects a proper subject of a law. But no municipal institutions, as such, can have any force to bind the rulers or inhabitants of separate regions. There is a necessity therefore of another common criterion, which is called the Law of Nations, and is that which regulates the intercourse of different states. This universal system was always most liberally recognized as part of the laws of England. To treat therefore of its general principles, is no deviation from the duties of this chair. Such enquiry leads to a becoming, an interesting, and frequently a necessary accession to juridical attainments.

STATES, like the individuals who compose them, are moral persons; they have a public understanding and will; they are

* 4 Burr. 1485.

capable of natural and acquired rights, and susceptible of respective obligations. The primary^b law of nations therefore is no other than the law of nature, so far as it is applicable to them. For as the civil institutions of every country are partly of moral and partly of positive obligation, so the same distinction obtains in the rules relating to the intercourse of different states. Whatever in this behalf reason dictates as a duty of natural justice, forms the necessary law of nations. This is of universal and indispensable obligation. On the other hand, whatever stipulations are introduced by treaty, or customs prevail by tacit consent, constitute, as between the parties at least, the positive laws of nations. These rules may indeed be varied by subsequent conventions: but no state^c can, by its *separate* ordinances, prejudice any part of the law of nations, any more than single citizens can, by their private resolutions, alter the law of the commonwealth, in which they live.

THE positive law of nations may also, I apprehend, be circumscribed in its extent; as certain European usages may never have been adopted in Africa. However, till the contrary appears, reasonable customs may, it seems, be presumed universally to prevail.

WE are thus led to enquire into the means by which the law of nations may be ascertained and known.

THE principal of these is the use of reason, which prescribes the common dictates of morality. "*Ratio, ipse, inquam, ratio,*" says Bynkershoek^d "*juris gentium est anima.*" For men^e are not exempted from natural duties, nor from their general relation to all other men, because they have formed themselves into distinct commonwealths. Their actions, in respect to foreigners and foreign states, may be morally just or unjust, as well as

^b Vatt. prelin. §. 5.—Ciz. de Off. l. iii.

^c Bynk. Eccl. Pol. l. i. §. 20.

^d Q. i. p. l. i. c. 2.

^e 6.

beneficial or pernicious. The supposed rights and obligations, therefore, which become the subject of doubt or controversy, whether they constitute a part of the law of nations, must be first estimated by impartial and enlightened reason, according to their intrinsic force; and this affords the most satisfactory method of decision.

BUT besides considering the abstracted fitness of measures, in respect to morality, our inquiries are commonly advanced by collateral assistance. Thus, principally, the practice of civilized states is understood either to establish or to be evidence of the law of nations. For a general effect must (as Grotius¹ observes) be produced by a general cause. That, therefore, may well be credited and relied on, in which civilized nations concur.

EXAMPLE may either add authority to the previous conclusions of reason, or elucidate what that had left obscure. In alleging such instances, a general preference² should be given to those of more recent date. For modern nations have greater scope of historical advantage and experience; and their conduct more effectually influences contemporary states to imitation and conformity. Thus also the political treaties of modern Europe, framed by men conversant in public affairs, and responsible for their conduct to an enlightened world, are worthier of being studied, and of more practical utility, than apophthegms of ancient poets and philosophers, though such have been very copiously collected by two³ of the greatest masters of general jurisprudence.

ANOTHER source, from which the law of nations may be inferred, is that of the Roman people⁴, on account⁵ both of its admired equity and extensive reception.

¹ B. l. c. i. § 14.

² Bynk. Q. j. p. ad lect.

³ Grot. and Puff.

⁴ *Qui partem armis imperium, juris con-*

servio, legumque majestatem custodiunt.

Grav. Orig. prol. gen. ad capitulum legum ju-

ventatum.

⁵ Strahan's pref. de m. civ. law.

NOR is this the only authoritative collection to be used. For in regard to maritime affairs, the customs of Europe have been digested into several codes of established estimation; among which, for the credit of this nation, the Laws of Oleron¹ call for particular notice. These compilations may be considered as declaratory expositions, or as forming a part of the law of nations.

BUT that which in practice most commonly regulates the intercourse of states, is positive agreement or convention. To the validity^a of a treaty, there is required an adequate power in the contracting parties, and their mutual consent sufficiently declared. It depends on the particular constitution of the country, in whose hands the supreme feacial magistracy, or lawful power of

¹ " The laws of Oleron are the antient
" universally received customs of the
" western part of the world, which Rich-
" ard I. of immortal memory, being upon
" his return from the holy war, thought
" fit to review and reform; and then to
" give them the stamp of his royal au-
" thority. These laws all the seafaring
" nations of this western part of the world
" soon after received and entertained from
" the English, by way of deference to the
" sovereignty of our kings in the British
" ocean, and to the judgment of our coun-
" trymen in sea affairs.

" You are, therefore, by the *laws of*
" *Oleron*, to enquire whether any have
" taken upon them the conduct of ships,
" as masters, without sufficient skill and
" experience; and whether any damage
" or danger hath arisen thereby. Whe-
" ther there be any masters of ships, that
" do not pay off their mariners honestly,
" without cavil or delays; that have not
" treated their mariners with humanity
" and care, when they were sick in their
" service; especially when they were
" wounded in defence of their ship.

" You are to enquire after all stubborn,
" quarrelsome, thieving, mutinous, and
" rebellious mariners; after such as have

" run away from service, or have not come
" into it according to their covenant;
" after such as steal away buoys, or cut
" buoy-ropes; and whether any have em-
" bezzled or possessed themselves of goods
" cast away, and [which] are no wreck,
" but are pursued and demanded by the
" true owners. For that is no wreck,
" properly so called, though the ship itself
" be cast away, where any creature, though
" but a dog or a cat, escape to shore alive.
" The custody of such goods belongs to
" the Lord Warden as admiral; and [they]
" are to be restored to the owners, the sav-
" ers first receiving a reasonable recom-
" pence, in proportion to their hazard and
" pains.

" I call *these the laws of Oleron*; not but
" that they are peculiarly enough Eng-
" lish, being long since incorporated into
" the customs and statutes of our admiral-
" ties; but the equity of them is so great,
" and the use and reason of them so ge-
" neral, that they are known and received
" all the world over, by that rather than
" by any other name." Sir Leol. Jenkins's
" charge at an admiralty sessions within the
" Cinque Ports, Sept. 2, 1666. vol. i. of
" his works, lxxxvii.

^a Vatt. b. ii. §. 157.

treating

treating with other nations, shall be lodged. But it behoves each state to see, that they stipulate with the persons having due authority.

ALL national conventions contrary to the laws of nature are clearly void in a moral light. And it has been * said, that such also are null, as are *pernicious* to any state; though mere *disadvantageous* terms will not render them invalid. But to draw the line between treaties, that should be called pernicious, or only disadvantageous, supposing the doctrine true, must often be a difficult exactness.

THE construction of treaties depends in general on the same rules of interpretation, by which positive laws are explained. But I shall mention one maxim to this purpose from the Author* whom I have repeatedly cited, That where a nation is bound to two others by inconsistent treaties, it ought to give the preference to the old ally: for the engagement was absolute and pure with him, as to the power of making it; and his right must, in the second contract, be understood to be tacitly reserved. This, however, supposes the former treaty to subsist in full force: for it is observable, that national conventions may grow obsolete by disuse, neither party exacting performance of the stipulations; or may be defeated and nullified by mutual infraction, much more easily than municipal laws can lose their effect. Another reason of preference, is the justice of the cause comparatively between the two allies. No treaty can oblige us to support iniquitous pretensions.

By treaties nations may acquire *new* rights; as an accession of territory, conditional payment of tribute, and the like: or their *moral* rights, which depend on the natural or necessary law of states for their origin, may by positive convention be modified and secured. Thus it may be thought a moral duty

* Vatt. b. ii. §. 160.—Grot. b. ii. c. 14. §. 12.

* Vatt. b. ii. §. 167.

* Vatt. b. ii. §. 169.

of humanity, that one nation should communicate its superfluities to another, which stands in need of them, for an adequate compensation: yet, by treaties, traffic may lawfully be laid under many positive regulations and restraints.

NATURAL rights may sometimes also be abridged, *without express treaty*, by the will of some state, acting for its own security. Thus, that countries should, in general, be accessible to foreigners, is the common privilege of mankind. With a mixture of indignation and surprize Ilioneus¹ exclaims:

"*Quod genus hoc hominum? quæve hunc tam barbara morem*

"*Permittit patria? hospitio prohibemur arena:*

"*Bella cient, primâque vetant consistere terrâ!*"

Such asperity, unexplained, has been often conceived a just cause of war. Yet the sovereign may issue prohibitions against entering his coasts, where he thinks necessity requires it.

"*Res dura, et regni novitas me talia cogunt*

"*Mâri, et latè fines custode tueri.*"

So also he may grant conditional permission. Among which terms of sojourning in another country, it is always tacitly implied, that the stranger be subject to the municipal laws where he resides, amenable to the courts of justice, and submissive to their sentence.

THE rights of every state, and the respective violations of them, either solely respect the nation at large, or one or more individuals also, as well as the body of the nation: for every such violation is to be considered as a common outrage, though chiefly felt by the immediate sufferer. The fields of the husbandman may be ravaged by hostile invasion; the cargo of the merchant may be injuriously detained in a foreign port; but the community partakes of the insult and the damage. Every

¹ Æn. i.

² Ibid.

B. ii. c. 2. §. 15. — Puff. b. iii. c. 3. §. 8.

³ Grot. mare lib. c. 1. et de j. b. et p. — Vatt. b. ii. §. 94, 100, 101.

breach of the law of nations is, for this and other obvious reasons, prosecuted and defended by public authority.

The general foundation of national rights seems to be the equality of nations. In a supposed theoretical state of nature, all men, as was mentioned in the last Lecture, are to be reputed equal. In like manner, states, according to Vattel, are naturally equal; (that is, according to the law of nature as applied to them) however they may vary in military strength, or extent of dominion. The law of nations equally dispenses to them its rights and its duties: they are all, as separate states, subject to no civil tribunal upon earth: they are entitled to send and receive embassadors; and are a substantive part in the great society of mankind. They may even remit a part of their independency, and retain the rest, possessing all the rights, of which they have not made a voluntary cession. Such conventional inferiority, depending on compact, can subsist no longer than while the treaty, which created it, remains inviolate, and in unremitted force. Nor is this a new refinement; for we find Cicero, in one of his orations, commenting on that word, "*Majestatem Pop. R. comiter conservans*," as familiar in treaties; and by which it was never understood, that the inferior nation renounced all claim to independency. While a people still enjoy the freedom of treating and contracting authoritatively with other states, that seems sufficient to denominate them a nation. The existence of a state, as such, draws after it these general rights.

The extent of boundaries, or distinct dominions, may next challenge our attention: for these limits circumscribe the effect of municipal law; by their largeness they add to the public power and convenience; and where they are unjust, give occasion to unceasing hostilities.

The rights, by which territories are appropriated to any state, are occupancy, conquest, and convention.

Prelim. §. 18, 19.

Pro L. Balbo.

right

K 2

PROPERTY,

PROPERTY, exclusive of all others, over things external, is generally understood to be a right introduced by civil society: by which, I apprehend, is meant such property as is permanent, transmissible, and may subsist abstractedly from present and immediate occupation.

PUFFENDORF seems to combat this opinion, arguing, "that all sovereign princes and commonwealths are now actually in a state of nature, and their proprieties are not determined by any common law or judge, but solely by compact, and the natural means of acquisition; and yet it was never imagined, that princes might ravage or steal from one another, without incurring the guilt of rapine or theft." But we may observe, that, as in a state of nature compact is of no force, except as between the contracting parties; so a treaty entered into by separate states gives no right, except as between themselves, and has no restraint or influence upon other nations. Thus, if Spain cedes any territory to France, the title, as between those powers, is immediately by compact. But in order to exclude other nations, the anterior right so conveyed must depend on occupancy or conquest, joined to continued possession. Now, what is in my present possession and use cannot be invaded, consistently even with the law of nature. Constant and immediate occupation is indeed a necessary ingredient in substantiating the title. It seems, therefore, that neither individuals in a state of nature, nor independent states, are at all capable of that sort of ownership or dominion, which is so much the subject of municipal laws, and which alone I take to be meant, when it is asserted that property is a creature of civil society.

As to contiguous and circumjacent parts of the ocean, doubts have been entertained, whether they are subject to appropriation by the neighbouring state, or to any peculiar dominion. The same divine grant (says Puffendorf) which first gave man a

^a B. viii. c. 1. § 3.

^a B. iv. c. 5. § 5.

right of assuming the sovereignty of the earth, included likewise the sea. But the direct result of this bounty seems rather communion of right. Necessity, indeed, or general good, might in other things justly introduce exclusive property or dominion: but the main, for the uses of fishery and navigation, (as Vattel observes) is inexhaustible. The argument of our learned Selden seems to be, that the free communion of the sea is *permitted* only, and not *injoined*, by the *necessary* law of nations. How far the open sea can be thought holden in unceasing occupation, (which the law of nature, I apprehend, requires to form an exclusive title); and how far rights of fishery and navigation are *mere facultatis*, and not lost by disuse; has been debated by very expert antagonists. All agree that the sea, for a certain distance from the coasts, may, for many reasons, be justly appropriated by the adjacent state. A more extensive sovereignty may certainly be conveyed by treaty, so far as the contracting nations are concerned. We may also truly insist, that no dominion over the sea is supported by so many or so strong reasons, as that of the British empire. It has been immemorially claimed and exercised, signalized with victories, often recognized, ratified by treaties, of general notoriety, and of almost general acquiescence.

THE conduct of nations to each other, as mutually hostile or pacific, may either consist in a reciprocation of good offices, and beneficial commerce, or rage out in battles and devastation. To compose differences, and to preserve and improve amity, it is necessary that nations should treat with each other; which must be done by public ministers. Thus the sacredness of ambassadors, which has so immemorially and universally obtained, is derived from its essential necessity to the common benefit of mankind.

THEY may have different degrees of rank and precedence, but the more substantial rights are the same, of all those who

* B. I. c. 23.

* *Mare clausum.*

are lawful legates from one independent state to another: this, however, does not extend to consuls, or agents of commerce.

The sacredness of public ministers includes their exemption from the civil coercion of the country where they reside. As to this point, I shall only observe, that if they are guilty of an offence, highly criminal in its own nature, or peculiarly injurious to the state to which they are sent, they and their papers may, consistently with the law of nations, be sequestered, to prevent the accomplishment of farther mischief: though it seems both expedient and just, in no case, to proceed to a municipal sentence on their crimes, but to be contented with remitting them and their accusation to the power that gave them their commission.

EMBASSADORS must be commissioned by the supreme magistrates, to whom the civil constitutions of each country intrust the right of making peace and war, and of treating with other nations. In Britain, this power is happily lodged in the king, or queen regnant, of the united kingdom. The actual possession and exercise of royalty is sufficient to authorize the ambassador's credentials. It is not requisite that the state to which he is deputed, should pry into his master's title to the crown. The law of nations, according to the opinion of a very acute reasoner^a on the subject, pays this deference to a king *de facto*, observing herein a rule similar to our municipal provision, which exempts from the imputation of treason those who assist the reigning prince, or act by his command.

BUT the authority granting the commission is not the only consideration. Objections to an embassy may arise from the unfitness of the person employed; and whether he shall for that, or some other reason, be refused admittance, depends on the law of nations, to be judged of by that power to which he is sent. Thus, if a traitor^c, attainted by our laws, should be deputed as a public legate to the British court, it would be a just

^a Ca. temp. Tal. Barchin's case. ^b Bynk. Q. j. p. d. ii. c. 3. ^c Bynk. Q. j. p. l. ii. c. 5.

cause for remanding him to the foreign potentate, who should so contumeliously insult our sovereign and his people; although it might not be advisable, that the sentence on the criminal should in such case be carried into execution. For an ambassador, before he is publicly allowed, is from the necessity of the thing under the protection^d of the law of nations.

When embassies, and the mediation of neutral powers, fail in attempting to conciliate exasperated nations, and to adjust the disputed rights between them, there is no jurisdiction upon earth to which they can appeal. They may, indeed, spontaneously submit to the arbitration^e of some other state: but that is voluntary and occasional; if it be declined, or fail, the resource is war.

This violent mode of seeking justice is divided into the less, or more solemn. The former consists in reprisals, of which I shall treat in another part of this course of Lectures, under the title of Captures at Sea.

As to the latter, it seems universally admitted, that, to constitute a just and solemn war, it is necessary that there be some cause of complaint highly important and well founded; that satisfaction should have been applied for in vain; and that the war be commenced by the authority of those magistrates, to whom that charge is permitted by the respective constitutions of the belligerent states.

To these conditions it has usually been added, as another previous requisite, that the war be declared in form. This custom was adhered to by antient nations; among the Romans^f it was inviolable; and it is in general much regarded by modern Europe.

^d Vatt. b. iv. §. 83.

^e Vatt. b. ii. §. 329.

^f Vatt. b. iii. §. 51.

^g Cic. de Off. l. 1. c. 11. The words

^h *nisi quod robis repetitis geratur*, I sup-

pose, describe a war of reprisals, and show the antiquity of that practice, though it appears to have been afterwards discountenanced by the Roman law.

THE reasons¹ assigned for its observance are, to shew that the war is conducted by public authority, not by private individuals; to testify to the world that there is just cause of taking up arms; and to serve as a last menace or admonition to the enemy to avoid the ensuing calamities, by doing justice and reparation. Another end may be proposed by it, which is, to facilitate the terms of peace, by discriminating the rage of unauthorized violence from formal and approved hostilities. Thus by the treaty² of Aix-la-Chapelle, prizes taken before the declaration of war were to be restored. It is plain, therefore, the declaration of war was of use and benefit in terminating the disputes.

ON the other hand, Bynkershœck, a man of a penetrating and original genius³, argues very ably against the necessity of such public denunciation⁴, before the actual commencement of hostilities, as not absolutely required by the law of nations, though it may be the part of heroism and magnanimity. That celebrated foreign jurist, however, admits, that, except in a war merely defensive, there ought indispenfably to precede an amicable application for redress, as well as injury sustained.

BUT the Professor Burlamaqui, a writer of the most humanely moral principles, surely carries his sentiments to the romantic height of chivalry, when he asserts⁵, that we ought not to commit hostilities immediately on declaring war, but to wait so long at least as we can without doing ourselves a prejudice, until he, who has done us the wrong, not only plainly refuses to give us satisfaction, but has put himself in a condition to receive us with bravery and resolution.

To this I shall oppose the more rational opinion of the author, whom I have just cited, "*post indictionem* (says he⁶)

¹ Grot. b. iii. c. 3. §. 11.—Bach. Comm.

² Ibid.—Vatt. b. iii. §. 51, 52, 56.—Burl.

pol. law, p. iv. c. 4. §. 16.

³ Vatt. b. iii. §. 56.

⁴ Q. j. p. l. i. c. 2.

⁵ V. Ow. 45.—Freem. 41.

⁶ Pol. law, p. iv. c. 4. §. 18.

⁷ Bynk. Q. j. p. l. i. c. 2.—Grot. b. iii.

c. 3. §. 35.

"bona hostium vulgè capiuntur; et hostis in hostem statim recedat, agat, si pacta non obstant." The Roman lawyer Tryphonius seems to go farther. He affirms, *"in pace qui pervenerunt ad alteram, si bellum subito exarsisset, eorum servi efficiuntur, apud quos jam hostes suo facto deprehenduntur."*

BUT prisoners of war are now never treated by European nations as slaves; and the rigour of the rule, in regard to the persons and goods of enemies, found in a hostile country at the commencement of a war, is relaxed often by mutual stipulation, and oftener by the voluntary clemency of sovereigns.

IT is said¹ to have been determined by all the judges of England, that if a Frenchman comes into this country, after war is proclaimed against his nation, his person and goods may be seized, although he was driven here by a tempest. But if he arrived before the proclamation, his person and goods shall be safe. If this opinion be authentic, it shews that the spontaneous hospitality of the English people, to a certain degree at least, had long ago, by continued usage, ripened into received law.

WE must allow, such seizures from unarmed sojourners have very little appearance of magnanimity. Those rights of war and conquest, where there has been preparation, or at least opportunity, for defence, are more honourable spoils.

IT is commonly said, however, that victory, in an unjust war, can give no true title to possessions, because all the right of making war is derived from the justice of the cause². Although this may be undeniable, in a strictly moral and conscientious light; it is, I fear, a merely theoretical principle, and can have little effect on the ordinary commerce of the world. For who is competent to estimate the justice of the war? Certainly it belongs to that power, which is constitutionally authorized to

¹D. l. xlix. t. 15, l. 12. ²Jenk. 201.—Ow. 45.—Freem. 41. ³Vatt. b. iii. §. 18.

declare hostilities. Necessity, therefore, has established, that a war in form should be accounted just on both sides as to its effects*. Acquisitions so made, are reputed valid and lawful, without reference to the justice of the cause, which is supposed to rest in the consciences of sovereigns.

It must, however, be remembered, as I shall repeat on a future occasion, that the voluntary law of nations, which authorizes these rules of property, does not give to him, whose arms are unjust, a genuine right, capable of disculpating his conduct, and acquitting his private conscience, but only the external effects of a law, and impunity among men.

We are not to imagine, that even in time of open hostilities, all national rights and obligations cease. "*Regulus* verò non deponit conditiones pactionesque bellicas et hostiles perturbare perjurio. Cum iusto enim et legitimo hoste res gerebatur: adversus quem et totum jus feciale, et multa sunt iura communia." Both the necessary and voluntary law of nations have effect in war; which, among civilized states, is never allowed to rage with unlimited and untempered fierceness. Thus it seems established, that heralds, and all who come to offer terms of truce and accommodation, are sacred and inviolable; and that captives cannot justly be slain, or otherwise punished, for their brave defence.

Yet conquest has sometimes been pushed to such extremity, as to end in the final delation of the vanquished state. This was the fate of Carthage. The Digests[†] acquaint us that a plough was brought into that city; by which solemnity it ceased to be a state, and to be any longer capable, in a collective view of its inhabitants, of social rights.

* Vatt. b. iii. § 40. 190. 205. 208.
209. 212. 219. — Grot. b. iii. c. 6. §. 2.
subdiv. r. 4. — Barl. pol. law, p. iv. c. 7.
§. 12. 14.
† Grot. prolegom. §. 25. 26.

† Cic. de Off. i. iii.

‡ Vatt. b. iv. §. 87.

§ Vatt. b. iii. §. 143.

¶ l. vii. t. 4. l. 21.

WHAT may possibly lead to such catastrophe, is, that nations frequently continue war, from a fear of making the first advances to accommodation.

IN any case, there can hardly be a more beneficent or glorious office than that of reconciling belligerent powers as a common mediator. It may indeed require great prudence and dexterity, as well as uprightness of intention. But it is an indispensable moral duty, on those sovereigns and states who are possessed of the means of succeeding in it.

THE mediator is not the guarantee of a treaty, because he has brought it to a conclusion. This is an engagement of too great moment to charge him with, except by his express stipulation. He is rewarded, not only with the satisfaction and renown of so meritorious an exploit, but with the increase of his domestic advantages and security. For, when the flames of war are kindled, who can prescribe limits to the danger and the ruin?

A SUBSISTING war between two or more nations, may lawfully form a restraint on the conduct of other states. I have before used the expression of neutral powers. Those monarchies and states, who would be thought to preserve neutrality, are prohibited by the law of nations from assisting either of the contenders, to the immediate detriment of their known enemies.

SUCH undue assistance is most commonly afforded by contraband commerce; which includes* all such articles as are apt instruments of war, when they are transported from the supposed neutral to the belligerent country, and without being manufactured into a different form, notwithstanding they may be of use or ornament in times of public peace. Such intercourse, indeed, is by many European treaties laid under specified restraints. But reason suggests the regulation above advanced, as part of the universal law of nations.

* Vatt. b. ii. §. 328. and b. iv. §. 17.

* Bynk. Q. j. p. l. i. c. 10.

WAR is only permitted. It is not the natural state of nations. The restoration of peace reduces them to their proper relation to each other, which is that of amity and benevolence.

Thus I have endeavoured to delineate some of the principal matters, with which the law of nations is conversant. To gain a comprehensive knowledge of that law, and to cultivate a reverence for its precepts, is worthy of the greatest minds. It is a study rich in delight, inestimable in importance, and which has for its objects, the peace, the happiness, and the honour of mankind.

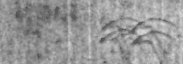
1. Puff. b. viii. c. 6. §. 2.

LECTURE THE FIFTH.

OF THE LAWS OF ENGLAND, IN A GENERAL
VIEW, AND WITH RESPECT TO THE VARIOUS
SOURCES FROM WHICH THEY HAVE
BEEN DERIVED.

*Multa dies variusque labor mutabilis ævi
Restulit in melius.* Virg. *Æn.*

THE FIFTH LECTURE
ON THE
LAW OF THE
MAGNETIC FORCE



LECTURE THE FIFTH

OF THE LAWS OF ENGLAND, IN A GENERAL
VIEW, AND WITH RESPECT TO THE VARI-
OUS SOURCES FROM WHICH THEY HAVE
BEEN DERIVED.



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of England. Where the positive laws are clear, all must
obey them on pain of a just punishment, which is the
law of the land.

of securing to persons the principles of right and wrong is avoid-
ed, where the municipal institutions are correct, it is then, in
general, concluded, that they are founded on the law of nature,
or contain nothing repugnant to it.

LECTURE THE FIFTH.

This fifth Lecture, from which our English laws have been
derived, is now my intention to consider.

OF THE LAWS OF ENGLAND, IN A GENERAL VIEW, AND WITH RESPECT TO THE VARIOUS SOURCES, FROM WHICH THEY HAVE BEEN DERIVED.

Logically, however, and as to the manner of reasoning, I shall
begin with the principles of justice, to which this country
has been subjected. It does not appear from whence the
laws could have been derived, except from a positive

IN the former Lectures I have endeavoured to explain the
fundamental principles of universal jurisprudence and civil
government, so far as I judged them a necessary, or at least a
proper introduction to the study in which we are engaged; and
have mentioned such matters as appeared most worthy of obser-
vation, respecting, first, the laws of man's nature; secondly,
those of positive institution, generally considered; thirdly, those
which establish the several species of magistracy, or different
kinds of dominion, exercised in a commonwealth; and lastly,
those which regulate the conduct of nations to each other. I
propose now, after the brief discussion of these preliminary doc-
trines, to take, as it were, a general and distant prospect of the
laws of England, before we descend to examine the particular
objects about us with more exact attention.

The Natural law, investigated by the due exercise of the hu-
man faculties, and the Divine will, as it is expressly revealed,
(both of which we contemplated in the first Lecture) are the
most stable and essential grounds, the immutable parts, of the
laws

laws of England. Where the positive laws are silent, all courts must determine on maxims of natural justice, dictated by reason; that is, according to the law of nature. The necessity of recurring to primary principles of right and wrong is avoided, where the municipal institutions are express: it is then, in general, concluded, that they are founded on the law of nature, or contain nothing repugnant to it.

THE other sources, from which our English laws have been derived, it is now my intention briefly to consider.

THE laws of England are esteemed by Fortescue, chief justice and chancellor to King Henry the Sixth, and of much ability and knowledge for that age, to be of earlier antiquity than those of Rome or Venice, and to have remained unchanged through all the revolutions of empire to which this country hath been subjected. It does not appear from whence the learned judge could derive this opinion, except from a patriotic zeal for our municipal institutions; but it has too much appearance of partiality and prepossession. Indeed the similarity of our idiom to the Greek, as well as other inducements, has persuaded some men to believe, that the inhabitants of the western extremity of our island were civilized, and acquainted with commerce, in a very remote age. Yet if we consider, on the other hand, the barbarous state of this country, when it was first visited with an armed force by the Romans, and the length of time which that people exercised dominion here, we must suppose, that very few, if any, of our general customs are of a British extraction, antecedent to that invasion.

THE Roman jurisprudence flourished in this island for the space of about three hundred and sixty years, from the reign of Claudius to that of Honorius; during which time some of the most eminent of the lawyers, whose opinions and decisions are collected in the body of the imperial civil law, as particularly

^a Jeak. 97. 117.

^b Fort. de laud. leg. Angl. c. 17.

^c Strahan's preface to Domat's civil law, p. xiii. — Seld. diff. ad Plotam.

Paulus, Ulpian, and Papinian, sat in judgment here, and distributed justice, conformably to their discipline, to the inhabitants. At the close of this period, it is not very probable, that any other rule of determination should be often referred to, or be much regarded, besides the laws of Rome. The interest and inclination of the Roman magistrates in Britain disposed them, and power enabled them, to fix the imperial constitutions with rooted stability in this dependent country, while the spirit of the natives is represented as too much broken and reclined to defeat or resist such a design, even supposing the two systems (if there was then any regular system of British laws) could in real excellence have borne any competition.

If it be objected, that the laws even of a prostrate and subdued country do not easily give place to those introduced by the conquerors, this may be true, if a short period is expected to accomplish the alteration: but such a space as above limited, seems fully sufficient almost wholly to establish the Roman jurisprudence among a people in such circumstances as I have alluded to, and who cannot reasonably be supposed to have had any authentic code, any written memorials of municipal polity.

THE refined system of those, who were philosophers as well as jurists, was afterwards shattered and overthrown by the successful invasion of the Saxons, and the consequent prevalence of their customs; which however appear in the succeeding ages to have strongly engaged the national partiality in their favour, and are considered as still one great basis of our laws. The vernacular language sustained as great a revolution: in which, compounded as it is, the Saxon dialect, I believe, even at this day, both in idiom and pronunciation, has the predominance, especially among all those employed in husbandry, and living remote from considerable towns. So that history can hardly parallel a nation so metamorphosed; which must be ascribed to the numerous hosts, and wide dispersion, of those victorious emigrants; and the memory of which is strikingly preserved in

Wales, where a seeming abridgment of the word Saxon is still used to signify the English tongue and people.

THE Saxon institutions were necessarily interspersed with some few Danish usages. Little, however, of our legal polity is derived from that source; for the number of those invaders was fewer, their conquests less complete, and their dominion of shorter continuance. Nor should we here omit to pay the tribute of praise and admiration to the venerable Alfred, who, though at times triumphant in the field, had a more undoubted superiority in the peaceable affairs of government, and in the defence of that political fabric, which in his time, and by his care, is thought to have been reared on a plan of harmonious symmetry and beautiful proportion.

BUT the most sudden innovation that ever perhaps was made in the laws of this country, was that which was accomplished under our first Norman monarch. By what avowed authority this change was effected, is best seen in Sir Martin Wright's Introduction to the Law of Tenures, throughout that judicious performance. But I shall here cursorily remark, that this was the date of transplanting the feudal law into England, as a general authoritative system. Whether any strictly feudal principles had before prevailed, is a disputable point; but something^a similar was certainly in practice. The feudal law itself much varied in different ages, being of indefinite antiquity, and in established use among the Northern warriors, when they first deluged the Roman empire with their victorious multitudes. Its essential and *unchanged* character is to constitute and define the relation of lord and vassal; of the lord, who is supposed to be the ultimate proprietor of the whole territory or kingdom, and of the vassal, who, in consideration of lands granted to him, is bound to perform military service, and to render homage and reverence to his feudal superior. The *variations* in this polity, meant to be alluded to, respect the permanency of the tenant's estate on the one hand, which gradually grew more firm and

^a *Cræg. j. f. l. i. dig. 7.*

durable ; and the conditions of his tenure on the other, which progressively became more multiform and oppressive. Thus a whole kingdom was *bolden*, (a word here used in a technical acceptance, and signifying, that it was enjoyed, in divers districts) on certain terms and conditions, with an acknowledgment of reverence due to the liege lord, and of his preheminent dominion in the lands. The actual occupier or tiller of the soil very rarely, if ever, held of the sovereign himself, but of some intermediate lord ; who in his turn was a vassal, and owed homage to one, whose domain was more extensive, and who was proportionably higher in military rank and dignity.

THE feudal law was first authentically reduced into writing by command of the Emperor Frederic *. That prince caused Obertus and Gerardus, *anno Christi* 1152, to compile, out of the various customs prevailing in different regions and cities, a regular code, which, under the title of *Feudorum Consuetudines*, we now find subjoined to the *Corpus Juris Civilis*, by a discordant kind of alliance.

BUT long before this authoritative collection appeared in the world, the spirit and essential characteristics of the feudal system had spread, wherever the Northern invaders came and conquered ; and not in our parts of Europe only, but also in the southern and eastern extremities ; and though the name was wanting, the same idea of military subordination, in respect to the tenure of land, was established among the Turks. Such and so extensive was the change wrought by those who triumphed over the ruins of the empire, and exiled the genuine institutions and manners of the Roman state.

THE introduction of the feudal law in England, admitted under the pretext of putting the nation into a posture of warlike defence, was the occasion (as has been frequently remarked) of

* *Crag. j. f. l. i. di. 6.*—*Chronol. ap. corp. jur. civ.*—*Seld. di. ad Flctam.*

† *Crag. j. f. l. i. di. 4.*

consequences not foreseen by those, whose consent was to that end sought and obtained, I mean of that national synod or parliament^a, which was convened for this important purpose. From the use of a few feudal expressions, probably little understood by these legislators, inferences were drawn tending to aggrandize each feudal superior, and in particular to advance the prerogatives of the crown. But I think it unnecessary to treat more minutely of this polity, more especially as it has been the subject of several systematical compilations.

As to what I have just alluded to, the augmentation of regal power, it may be here observed, that we find little, if any, traces of attempts made, or ideas conceived, of this kind, while any Anglo-Saxon prince was on the throne. It may perhaps be answered, that the history of those times is involved in much obscurity. Yet it is not doubted, but that we then had a formed constitution, national councils, and provincial magistrates. None of those princes is distinguished for attempting any despotical encroachments; and we may reasonably infer, that in their times the legal liberty of the subject was more extensive and more secure than under their Norman successors; although one of them, indeed, King Henry the First, made some advances towards restoring the pristine laws and constitution.

ABOUT the close of the last-mentioned prince's reign, there appeared in Europe a studious and spirited affection for the Roman civil laws; which, since their extermination, together with the imperial legions, out of Britain, had been successively digested into the Theodosian and Justinianean codes, and which within the same period had at intervals revived in some countries, though very little, if at all, known or attended to in our own^b. They were now cultivated even here with some regard, being admitted, in a very imperfect degree indeed, to a sort of *jus postliminii*, though they were not suffered to invade or influ-

^a Sir M. Hale, hist. com. law, c. 5.

^b Seld. diss. ad Fletam.

ence the freedom of our political constitution¹. But in other matters our jurists again turned their aspect to the laws of Rome.

KING STEPHEN, it is true, forbade his subjects from having certain laws, imported from Italy, in their custody. Whether the inhibition was levelled (as Sir William Blackstone² thinks) against the Cæsarean Code, or (according to the opinion of Selden³ and others⁴) against the Papal decrees then first imported hither, it was soon revoked or lost its validity; for we are told by a monkish historian⁵, "*ed magis legis virtus invaluit, quod amplius eam nitebatur impietas infirmare.*"

AFTER a little familiarity with the Roman civil laws, particularly those contained in the Digests, the critical reader, I think, cannot but admire the precision, brevity, and elegance, with which they are expressed. Several maxims, conveyed in general terms, and received as part of our immemorial common law, flowed perhaps from this source. I have before quoted rules for the interpreting of laws, which seem evidently taken from the Civilians. Thus also our legal apophthegm, That no man shall take advantage of his own wrong, appears but a translation of the language of Ulpian⁶, "*Nemo ex suo delicto meliorem suam conditionem facere potest.*" Some of our earliest juridical writers, particularly Bracton and Thornton, have transcribed considerable passages from the Roman collections. This they did, according to Selden's opinion, not because they thought any foreign code could bind the subjects of this realm, but in order, that where the laws of England were silent, they might confirm their own problematical or conjectural positions of natural reason, by the doctrines of the Civilians, or, where both laws were consonant to each other, might by such citation illustrate and explain our municipal institutions. The same very learned antiquarian mentions three instances, in which ar-

¹ Seld. diff. ad Fletam.

² Comm. Introd. §. 1.

³ Jan. l. ii. §. 43.

⁴ Dav. 70. a.

⁵ Seld. diff. ad Fletam, c. vii. §. 6.

⁶ D. l. L. t. 17. l. 134.

guments taken from the Roman laws were used in our ordinary courts of justice; first, to mark and establish the distinction between a natural and a civil death, called by the Civilians *media capitis diminutio*, as of a prior deprived of his priory; secondly, to prove, that where no time is mentioned for the payment of money, it shall be due from the delivery of the instrument; and lastly, to shew, that unreasonable customs, which have manifestly crept in "*errore primo*," ought, notwithstanding their duration, to be abolished. Such *antient* examples of practical English lawyers borrowing from the Civilians, are, I believe, extremely rare; but in more modern times, since the business of the Chancery has become so diffusive, the advocates and judges in that court have frequently and unreservedly resorted for arguments and illustrations both to the text and comment of the Roman civil law.

The three kinds of laws, which I have mentioned as obtaining force in England, the Saxon, Feudal, and Roman systems, exert the remains of their influence on very distinct subjects. The frame of our whole constitution, the trial by jury, and many received doctrines respecting crimes and punishments, may be considered as of Anglo-Saxon original: much of the law concerning landed estates depends on feudal principles: and in contracts affecting personal property, even our legal judicatures (as distinguished from those of equity) have been long acquainted with the use of the Roman institutions: in which branch, it was not to be expected, that our municipal jurists could carelessly overlook such useful compilations, or shut their eyes against the light to be received from thence in illustrating these subjects, and forming their decisions. It was surely prudent to use these declaratory expositions of the rules of natural justice, confirmed by so much learning and experience, wherever our tribunals could find no particular principle or precedent to guide them, among the traditionary maxims or forensic annals of our own country.

I SHALL next speak of canon law, and shew how differently that expression may be used; which will open an analytical view of the ecclesiastical polity of this kingdom.

Jus canonicum is generally explained by Lyndwood^a to be "*ab ecclesiâ, seu viris ecclesiasticis constitutum.*" But let us be more particular in our inquiries. Our ecclesiastical polity is not only distinguishable from foreign canon law, but the latter itself also is of various texture.

ECCLESIASTICAL constitutions^b began first to assume the form of laws in the time of Constantine, who added the energy of public authority to the synods at which they were enacted. After him Justinian^c gave a solemn ratification, by the words "*Sanctimus vicem legum obtinere;*" to the ordinances^d made in four councils, holden at Nice, Constantinople, Ephesus, and Chalcedon. Ayliffe^e distinguishes the more antient canon law, thus established in councils of the church, from the *jus pontificium* founded on papal authority: which, however, became in process of time so far incorporated with the other into one general system, that the foreign canon law appears now to consist almost wholly of decrees and decretal epistles of popes, though many of these were probably founded on earlier and better authority^f. Various collections of canon law were, in different ages, sent out into the world under the authority of successive popes^g. The code compiled by direction of Gregory the Thirteenth, is spoken of by Sir William Blackstone^h as containing the whole body of Roman canon law; but to this, it seems, may be addedⁱ, as text also of received validity among canonists, the institutes framed by authority of Paul the Fourth, and the seventh book of Decretals.

^a Prov. 76.

^b Ayl. Introd. Parer. viii.

^c Nov. 131. c. i.

^d It is asserted, that the canons made at these councils were, with others, received in this island at a national synod holden A. C. 680, by Archbishop Theodore, at

the command of four Saxon kings. Ayl.

Introd. Par. xi. xxxi.

^e Int. Par. vii. xv.

^f Ayl. Int. x. xi.

^g Ayl. Int. passim.

^h Comm. v. i. 82.

ⁱ Ayl. Int. xxv. xxvi.

IN respect to the force of the Roman canon law in England, Sir William Blackstone^a observes, that it does not bind here because it was declared to be authentic by Gregory, and that the legislature never recognized any foreign power as superior or equal to it in this kingdom. It is perfectly clear, that such law does not *now* bind here from Gregory's ratification of it. So much of any foreign canons, as is universally binding in England, derives its present force either from having been expressly enacted here, by way of adoption, in parliament, or in councils; and ratified by parliament; or from tacit usage and immemorial consent, by which such extrinsic institutions have been incorporated into our unwritten common law. These are the several grounds to which we ought now to refer the validity of the foreign canon law, so far as it is received in England. But in times of Popery, Sir William Blackstone^b admits, (notwithstanding the legislature never recognized any foreign power) the pontifical collections were received *as authentic* in this island. Many of the decretal epistles, which form the text of the Roman canon law, were directed into this country, to decide matters in doubt or controversy here. And it seems credible, that for the most part, till the dawn of the Reformation, the Romish canons in general, not being derogatory from the king's^c prerogative, were admitted amongst us upon the ground of authority, as much as of voluntary acceptance^d.

SIR JOHN DAVIS^e, indeed, industriously recites three instances of Romish canons not received in England; from whence he argues, that others by the same reason might be rejected. One of these cases, the exemption of priests from all secular power, was considered as a gross attack on the prerogative. The legitimation of children born before wedlock, which is the second instance, and which was refused by the parliament of Merton, would have been a violent innovation of the municipal law, in a matter which that had provided for; and the third canon

^a Comm. v. i. 79.

^b Comm. v. i. 82.

^c V. R. 16 R. II. c. 5.

^d V. Gibb. Cod. xv. xxviii.

^e 7p. b.

quoted

quoted by him as rejected here, that relating to donatives, was, as he admits, alike slighted in many parts of Europe. Notwithstanding these few instances, the papal decrees in general must be supposed to have greatly influenced the ecclesiastical law of the kingdom, while papal power was in its meridian splendor. It may be observed in particular, that after the sixth book of Decretals was compiled by Boniface the Eighth, that pope^f by a bull enforced its reception in all courts of law and universities. And accordingly, the same year the compilation was made, it was formally promulged in Oxford^g.

AT the dawn, however, of the Reformation, the parliament declared, in regard to the very subject we are considering, that this realm was free from subjection to any man's laws, except such as have been here expressly enacted, or such other as the people at their free liberty, by their own and the king's consent, have bound themselves to observe by long use and custom. This parliamentary declaration may confirm, what I have before intimated, that so much of the ecclesiastical polity of the kingdom as does not depend, either for its ratification or enactment, on any statute, is to be considered as part of the common law of the realm, and its authority here is now to be referred, like other branches of that system, to custom and immemorial usage, whether originally instituted by councils, or decreed by popes^h. The English canon law, in this large sense, is not confined to the cognizance only of our spiritual jurisdictions. Thus, in the year 1657, it was holden clearly by the court of Exchequerⁱ, that the council of Lateran, which, amongst its other institutions, freed the Cistercian order from the obligation of paying tythes, was a general law received in England, which included all men's consent, and was as forcible as an act of parliament.

OTHER parts of our ecclesiastical polity, not depending on the force of custom, derive their authority from express statutes,

^f Ayl. Int. xxiii. xxiv.

^g Dav. 71. b.

^h Palm. 469.—Vaugh. 182.

ⁱ Hard. 101.

by which they have been either *enacted* or *ratified*. Of the former kind are, particularly, the provisions contained in the several acts of uniformity. By the latter expression I refer to the statute¹, which ratifies and gives a parliamentary force and sanction to canons made in England before the twenty-fifth year of the reign of Henry the Eighth, until a review thereof should be had by thirty-two persons, (whom the king is impowered to appoint) sixteen of the clergy, and sixteen of the temporality, of the upper and nether¹ house of parliament. This act confirms those decrees of our English councils, commonly called *legatine*² and provincial constitutions, printed with annotations, under the name of Lyndwood's Provinciale, and generally, I believe, received as law before this parliamentary ratification. But the canons here made in the year 1603, (which are usually³ understood by the term *canons*) being subsequent to this law, receive no confirmation by it, and have been solemnly⁴ adjudged not to bind the laity, because not enacted by the common consent of the realm. That is, they are not binding on the laity *proprio vigore*, as it is expressed, or on account of their having been enacted in convocation. For some of these last-mentioned canons are only declaratory of the antient canon law, which, provided it hath been received in use amongst us, and is not repugnant to the king's prerogative, nor to any statute or express rule of the common law, is still considered as of force⁵ in England, or as we should rather say, (according to what I have before observed) forms part of the common law, part of the ecclesiastical polity of the realm. Many of our present ecclesiastical laws are undoubtedly of foreign extraction, and

¹ St. 25 H. VIII. c. 19. Dr. Burn, in the Preface to his Ecclesiastical Law, says, it was so enacted in regard to the whole canon law; but it seems, the review was to be confined to the acts of our English councils.

² This expression, which would now be considered as unparliamentary language, is very uncommon in the authentic records of any age.

³ The title of these legatine constitu-

tions might alone suffice to prove the weight of papal authority in England. In the Synod under Otho, he is said to have presided "*assidentibus sibi Archiepiscopis, &c.*"; and the other is said to have been holden by Othobon, in the presence of the Archbishops, &c. Lynd. Prov.—Gibf. t. XII.

⁴ Gibf. pref.

⁵ B. R. H. 328.—Str. 1058.—Sal. 672.

⁶ Gibf. pref.

some are entirely of English origin. But now they all alike depend, as to their general binding authority, on the same foundations as the whole body of our English laws, immemorial custom, and express act of parliament¹.

THE subjects of canon law, as practised in our ecclesiastical tribunals, have been injudiciously attempted to be comprised in the following line;

Judex, judicium, clerus, sponsalia, crimen.

None of these subjects is the exclusive and absolute province of the spiritual judge. The third and fourth articles are more peculiarly matters of ecclesiastical cognizance than the rest, which are only so, when they have an immediate relation to that system, or when offences are prosecuted with a view rather to the culprit's reformation, than to the public advantage of punishment.

TREATISES have been written concerning the points of variance between the Roman, civil, and canon laws: in which instances, Sir Thomas Craig² tells us the inhabitants of this island have usually given the preference to the law ecclesiastical. Indeed, in computing the degrees of consanguinity, the canon, and not the civil law, is followed by us³. But I know not that to be acquainted with this mode of reckoning is of much farther use, than sometimes more readily to understand the description of a title to lands by hereditary descent. For in construing the statute of distributions, (passed since the time of Sir Thomas Craig) which regulates the disposal of personal estates in cases of intestacy, it has been adjudged⁴, that the civil, and not the canon law, is to be the guide of decision. I shall here

¹ This detail will show that the learned Judge Doddridge was not perfectly accurate or sufficiently explicit, when he said, "the law of the English church is not the law of the Pope, but is all extracted from the ancient canons, as well general as national." Latch. 234.
² j. f. l. i. dieg. 3. §. 24.
³ Co. Lit. 24. a.
⁴ Prec. Chanc. 593, 594.

farther observe of the canon law, that to it we must ascribe " the original of the benefit of clergy ; which privilege is, however, regulated by divers acts of parliament, and by a series of judicial decisions.

THE courts of judicature, in which, chiefly and more directly, the authority of the canon and civil law in general prevails, will be distinctly mentioned, in treating of jurisdictions not proceeding by the general laws of the land.

THE Law of Nations is another constituent part of British jurisprudence, and has always been most liberally adopted and attended to by our municipal tribunals, in matters where that rule of decision was proper to be resorted to, as questions respecting the privileges of ambassadors, and the property in maritime captures and prizes.

BUT the branch of the law of nations, which there have been the most frequent occasions of regarding, especially since the great extension of commerce, and intercourse with foreign traders, is called the law of merchants. This system of generally received law has been admitted to decide controversies touching bills of exchange, policies of insurance, and other mercantile transactions, both where the subjects of any foreign power, and (for the sake of uniformity) where natives of this realm only, have been interested in the event. Its doctrines have of late years been wonderfully elucidated, and reduced to rational and firm principles, in a series of litigations before a judge, long celebrated for his great talents, and extensive learning in general jurisprudence, and still more venerable for his animated love of justice. Under his able conduct and direction, very many of these causes have been tried by a jury of merchants in London ; and such questions of this kind as have come before the court of King's Bench in term time, are laid before the public by a copious and elaborate compiler.

THE law of merchants, so far as it depends on custom, constitutes a part of the voluntary, not of the necessary, law of nations. It may therefore, so far as it is merely positive, be altered by any municipal legislature, where its own subjects only are concerned. Innovations may also be made in the whole voluntary law of nations, *so as to affect the inhabitants of different regions*, by treaty between the respective powers. But no change can be wrought in the natural law of nations, or the rules of moral justice applied to men as the members of different states, either by the sovereigns thereof, or any confederated union of human authority.

IN this general view of the laws of England, it may be sufficient in a cursory manner to allude to the forest laws, and the local customs of particular districts. The former, though very fortunately fallen into disuse and decay, can hardly be considered as wholly perished and extinct. Of these I shall take some farther notice in speaking of the courts of the forest. The latter, as for instance the law of the Stannaries in Cornwall, and the customs of the city of London, cannot properly engage much of our attention in the present discourse. For these are not so incorporated and intermixed with the laws of England, as to have a general influence upon that system, but are rather distinct appendages, as well as circumscribed in their operation.

THUS have I briefly treated of the chief grounds or sources of the laws of England, with some account of the ages when they were severally introduced, and of the subjects, over which their respective influence has been peculiarly extended.

THESE materials (if I may so speak) have been gradually interwoven by custom into our common or unwritten law, and occasionally been made an explicit part of the statute or written law by authority of parliament, as I have more especially shewn to be the case in respect to the ecclesiastical polity of the realm.

THE expression of common law is sometimes contrasted with that of statute law, as I have here used it; sometimes it is opposed to particular and local customs; sometimes to the rules prevailing in courts of equity; and sometimes it stands in contradistinction to the civil laws of Rome. The original of the appellation seems to be a translation of the *jus commune* or sole-right, mentioned in the laws of King Edward the Elder, expressing the same equal right, law, or justice, due to persons of all degrees. It was afterwards given to the laws contained in the code of King Edward the Confessor, which were common or general to the whole realm, and in that respect distinguished from the Northumbrian, and other laws and usages of less extensive territorial authority.

STATUTES are distinguished into public and private; the former being general, the latter limited, in their operation. This distinction is necessary to be attended to, because the judges are bound to take notice of a public act of parliament; but he, who would avail himself of a private statute, must set it forth in a special plea upon record, and shew that his case is fully within its provisions, and must also, in strictness, prove it in evidence by an authenticated copy compared with the parliament roll. However, it has been of late usual, for the case of parties soliciting a private act of parliament, concerning any considerable district, or otherwise extensive in its effect, to insert a clause declaring that such statute (though not of a general nature) shall be reputed and taken to be a public law.

THE statutes have been, from time to time, published with copious indexes; in which particular Ruffhead's edition is thought to deserve the preference. It is therefore a matter of ready and easy discovery to know what is the statute law of the kingdom in ordinary cases. Occasionally, indeed, it is necessary to study the text with close attention, to call in the most approved rules of interpretation, and to have some acquaintance

* Jurisd. Chanc. vind. 1 Ch. Rep. App. 60.

with legal topics and ideas. It must farther be confessed, that there are some acts of parliament, which have been productive of much controversy, and of many decisions in our courts of justice. In such cases, the several judicial constructions must be carefully studied, in order safely to apply the statute to the case in question.

As to the common or unwritten law, the most satisfactory method of ascertaining any point thereof, is by recurring to former judgments of the superior courts. These decisions are transmitted to us, not only by the records thereof (which are kept with great order and care) but also by very voluminous collections, called Reports, the laborious works of various learned compilers, which have been from time to time published, and have acquired different degrees of reputation and authority; all having some weight, except a very few books, which seem doomed to total disregard. For a period of above two hundred years, beginning with the reign of Edward the Second, these Reports were taken by the appointed officers of the respective courts, and are printed under the name of the Year-books, which are unquestionably authentic; but the legal learning they contain is for the most part either obsolete, or not reducible into practical utility, without long and painful assiduity. To some in particular of the succeeding Reporters, I may perhaps venture to direct the more special attention of my audience. Plowden, then, Lord Coke, and Sir George Croke, seem to have stood the highest in estimation. In after times, Saunders, Levinz, and Lord Raymond, have (among others) been celebrated for their accurate and copious recital of legal judgments, and have done lasting and important services to their profession and their country. But one of the most perspicuous, useful, and elegant repositories of juridical knowledge, is Peere Williams's Reports. That lawyer, in his own arguments, displays a spirit of genius and eloquence, of which one would hardly expect such topics could afford any opportunity.

BESIDES the books of Reports, there are certain legal treatises, which, either from the authorities therein cited, and to which

which it would be superfluous perpetually to recur, or from the credit justly due to the writers, or from the approbation of successive ages, are quoted as demonstrative oracles of the common law. But these observations seem to intrench upon the subject of the ensuing discourse; which is intended to contain considerations on the study and profession of the laws of England, and in which it will be proper to delineate the plan pursued in the remaining Lectures.

LECTURE THE SIXTH.

OF THE STUDY AND PROFESSION OF THE
LAWS OF ENGLAND, WITH A DELINEA-
TION OF THE PLAN PURSUED IN THE RE-
MAINING LECTURES.

*Qui autem interpretes juris vituperat, si imperitos juris esse dicit, de
hominibus, non de jure civili detrabit: si peritis non putat esse ob-
temperandum, non homines ledit, sed leges ac jura labefacit.*

Cic. Orat. pro A. Cæcina.

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LECTURE 21

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OF ENGLAND, WITH A DELINEATION OF THE
PLAN PURSUED IN THE REMAINING LECTURES.

A JUDICIOUS skill in the municipal laws of any country, amply recompenses the labour of acquiring it, by its usefulness and dignity. This knowledge ascertains the civil rights and duties of all orders of men in the commonwealth; and must therefore be allowed to maintain a very pre-eminent rank among the various attainments of human industry.

It is supposed, that a greater degree of juridical information is necessary to the practising lawyer, than to those in any other sphere of life. This holds infallibly true as to certain parts, and those too the most difficult in legal learning, but not, I should think, as to the whole science. It may indeed be reasonably expected from the practising lawyer, to be better acquainted with the abstruse doctrines respecting estates in land, and other branches of a more peculiarly professional kind, than men in different situations. But the constitutional law of England ought perhaps to be studied with the same attention by all whose rank and previous education are suited to the acquirement

quirement of liberal knowledge, and who may be called upon to display their talents in future life beneficially to the public, and honourably to themselves.

To alleviate the time and labour requisite to accomplish an English advocate, we may reflect, that a competent skill and expertness in the laws of our country is attended with this advantage, that the practical lawyer has the most frequent occasions of usefully exercising his professional learning, though perhaps not all of them equally splendid and important. While the most improved erudition in other branches of knowledge, and the attainments of laborious years, too commonly seem to sleep in the possessor.

"*Omnes non possunt (says Cicero*) ne multi quidem, aut jurisperiti esse, aut disert.*" This difficulty of acquiring legal learning, however great in general, must be confessed to be particularly enhanced among a people that have, like this nation, been long civilized; where new species and subjects of property have been devised, and gradually regulated by new principles of decision; where litigated questions, involved in their circumstances, and not easy even to be stated, yet often bearing a strong resemblance to each other, have consequentially produced nice refinements and subtle distinctions; and where the change of manners in different ages makes it necessary, in order fully to understand some of our municipal institutions, to trace scientifically their history and progress. Accordingly, the time and labour necessary to be employed in the study of our laws is mentioned in strong terms by many who had most effectually surmounted the difficulty, and whose learned writings are holden in the highest estimation.

Hence we may learn to reject an error, not uncommon amongst men unskilled in this science, who set up their own ideas of reason and common sense, as the test of what the law

* *D. Of. l. ii. c. 19.*

is or ought to be. In this they may fancy themselves supported by the following maxim of English jurisprudence, That the law is the perfection of reason; by which however is only meant, the conformity of the law to the rational judgment of such enquirers as are well versed in the knowledge of it.—For a man of the most penetrating understanding would rarely be able to solve an intricate legal question, unless a general acquaintance with the whole law capacitated him to judge of the various relations and dependencies of the case stated for discussion, and of the consequences which his determination might involve, by shaking and deranging the juridical system. It must be remembered, how great a part of municipal law consists of positive institutions, having little or no original connexion with the principles of natural law and abstract justice; established at first arbitrarily, because it was necessary they should be in some way settled, and adhered to afterwards for the sake of uniformity of decision, which the welfare of the community demands. As in civil life rules of property must be instituted, they must also be permanent and stable; there must be no clashing of determinations, consequently former judgments must be known and understood. There is therefore no study in which precipitate opinions are more to be avoided than in that of the municipal law. Thus Barbeyrac^a admonishes, "*omnis absit in judicando precipitentia, adeoque extemporaneae sententiae temeritas cave pignus ut angue fugiatur.*" The inexperienced are confident; the more learned usually pronounce with hesitation and restriction; and the greatest proficient only can reasonably and justly assume a decisiveness of judgment. For this science may be compared to an extensive and variegated country, which must be travelled over to be known perfectly, though men of superior abilities accomplish the task more expeditiously than others, and those of quick perception more readily descry the distant objects.

MANY of those parts of the law, which I have before alluded to as of positive institution, such for instance as the pro-

^a *Grat. de stud. jur. recte instituendo.*

perties of intailed estates, and of estates in which there subsists a joint and contemporary ownership, are wholly unadapted to rouse the attention, or interest the affections of the mind, and of course make little impression on the memory. Several legal principles of this class are much easier to be understood than remembered. These reasons induce me to believe that the commencement of the study of our laws is usually delayed to too late a period in life. The memory in young minds is thought most tenacious: and therefore an early familiarity with legal ideas and legal language might be a saving of time and labour, and facilitate the future researches of the maturer student.

ANOTHER cautionary advice I would give, is, not to rely on authorities as they are quoted, but, as opportunity serves, to have recourse to the original: by which means the subject may be more easily and more fully comprehended by perusing the context of the passages adduced, and both the involuntary errors and wilful misrepresentations of the transcribers may be amended. For writers too often allege citations to answer their present purpose, to coincide with their chain of thought, and sometimes to favour prejudices, of their partiality to which they are scarcely sensible.

THESE observations may lead us to consider very shortly the character justly due to the three great abridgments of the law. That of Mr. Viner is the most copious, and is enriched with the publication of several determined cases, either not at all, or, generally speaking, not so fully and accurately reported elsewhere. The work which passes under the name of Bacon's Abridgment, is more in the stile of dissertation, the author extracting, for the most part, from the cases alleged in the margin, what he takes to be the result of them; and it is therefore to be read with caution. This is supposed to have been partly compiled by Lord Chief Baron Gilbert. It is to be lamented, that the works in general of that eminent judge, whose learning and genius are so highly and deservedly esteemed, should not have received more of the *time labor* before their public appearance. Lastly, the Digest

Digest of Lord Chief Baron Comyns deserves to be mentioned with particular encomiums. In this admirable collection, the usual method pursued of conveying the doctrine on any subject, is, to set down a general position, then to illustrate it by examples, and finally to restrain it by exceptions; all which is done with remarkable clearness and conciseness of expression, and the information desired is seldom long sought after, or in vain. These abridgments are to be considered as books of reference or general indexes, and not to be quoted in courts, except when they give an account of the date and substance of an adjudged case; but recourse must be had to the Reporters, and others whom they cite, being of approved authority.

THE subject of this discourse now leads me to speak of the profession of an Advocate, an employment or situation which in Rome was frequently assumed by the greatest men in the commonwealth; and which (if it hath in any measure abated of its extrinsic dignity and repute) hath still (as Domat* insists) the essential characters of honour annexed to functions, which in their nature imply the use of the first qualities of the mind, and of the chief virtues of the heart*. It is treated as a splendid distinction of the Roman Advocates, that they accepted no pecuniary reward for their conduct and defence of causes; which was expressly prohibited by the Circian law. But in effect they reaped abundant and satisfactory recompence, by making their forensic talents subservient to the purposes of ambition. As soon therefore as the government was changed, and the favour of the people ceased to be any longer the disposer of preferments, the Roman Lawyers, grown perfidious and corrupt, under the specious name and thin pretext of *honorarium*, not only accepted gifts, but the largeness of them was found necessary to be restrained by a public decree* of the Emperor in the senate, which prescribed ten sesterces as the highest limit

* Pub. law, b. ii. t. 6.

* The credit of the profession is not only supported, but raised to a very high pitch, in the speech delivered to the newly

created sergeants, in Pope's 45. and the following pages.

* Tac. Annal. l. xi. c. 5, 6, 7.

of pecuniary compensation. Yet the idea, that the remuneration of an advocate was *honorarium*, and not the price of mercenary labour, was adopted, like several other notions and expressions of the Civilians, into the English courts. Perhaps this was an unnecessary compliment to the profession. He that engages his care and diligence for the advantage of others, is both justly and honourably intitled to a suitable recompence from the public, if their interest is concerned, from individuals, if their benefit is consulted by the person employed. Thus men in the most respectable stations, the civil and military officers of government, ecclesiastics, and with like reason lawyers, may without disparagement receive a fair profit, as the fruit of those occupations, to which they have devoted their attention.

THE Roman law¹ obliged advocates by an oath, either not to engage in, or immediately to relinquish, the support of a cause, that appeared notoriously unjust. This regulation seems liable to much casual abuse. A scrupulous advocate might entertain too unfavourable an opinion of his client's case, and too precipitately desert it, through a terror, however groundless, of incurring the guilt of perjury.

In France, where the imperial constitutions are much incorporated with the municipal law, the oath of the advocates is only general, faithfully to perform the duties of their function; which solemnity, with the degree of a bachelor of civil and

¹ Beuch's *Serm.* vol. i. *serm.* 4.—The same learned and ingenious author writes (vol. ii. 153.) that "in Athens they contributed the pleadings of their causes by a strict law, casting off prologues and epilogues, and commencing them as an immediate representation of the case, by an impartial and succinct declaration of mere matter of fact. And this was indeed to speak things as they

" a judge to hear, because it argued the pleader also a judge of what was fit for him to speak." This seems in effect commanding men by law to be able pleaders, without affording much help to the understandings of the judges and auditors to distinguish whether the law (if any such ever existed) was complied with.

² *Cod. l. iii. t. 1. l. 14.*

canon law^a, taken in some university, forms the requisite conditions of practising in the courts of that kingdom^b. Cases certainly may arise, in which it is becoming in an advocate to decline any further contest; but even this principle, through a mixture of unskilfulness and a scrupulous temper, might be carried to a dangerous excess. It is however his constant and undoubted duty not to advise frivolous litigation, not to be a party or privy to injustice or fraudulent combinations, and not by undue means to support even a rightful cause.

DECEIT and evil practices in English advocates, is punishable by a very antient statute^c; which Lord Coke^d ascribes to the tricks and shifts that had been used in the preceding reign, especially in favour of great men: and we meet, in a book of authority^e, with an indictment grounded, as it appears, wholly on the common law (that is, without the aid of any statute to support it) against a counsellor for taking fees on both sides, and betraying his client's cause.

ECCLESIASTICS were almost the only practising advocates in England, antecedently to the council of Tours, when they were prohibited by canon from engaging in the professions of law or physic^f. But for several reigns after the Conquest, churchmen frequently occupied a seat in the superior judicatures of law, as well as of equity^g.

It is observed by Fortescue^h, that degrees in municipal law are taken in no country except England; where those of barrister and serjeant have been known for many ages, besides the different rank, which the king may appoint by office, or patent of precedence. A barrister is so constituted in one of the four

^a No degree in canon law has been conferred by the university of Oxford, since the revival of the statutes by Archbishop Laud, nor probably for a long time before; though in one at least of the colleges there, founded in the reign of Henry the Sixth, an express precedence is given to canonists above civilians.

^b Dom. pub. law, b. ii. t. 6.

^c 3 E. I. c. 29.

^d 2 Inst. 213.

^e Treas. P. C. 261.

^f Seld. Diff. ad Fletam, c. vii. §. 7.

^g Co. Lit. 304. b.

^h De laud. legum Anglie, c. 50.

inns of court; by which he is intitled, and compellable¹ when required by a competent judicature, to defend the causes of others; and being thus considered as supporting a public and known station in the commonwealth, seems to add to his real importance. A serjeant is created by virtue of the king's mandatory writ with divers formalities, and antiently took an oath² of office, not unlike that imposed on the advocates of Rome. Lord Coke³ mentions by name several learned barristers, who, in the reign of Henry the Fifth, notwithstanding the king's writ, neglected and refused, out of diffidence as it seems, to assume this superior degree of serjeant, till they were enjoined so to do in parliament. As a necessary qualification to practice, both orders of advocates are required to take the oaths and subscribe the declarations for the security of the government, and against the popish doctrine of transubstantiation.

THE increasing voluminousness of the law, together with other considerations, has of late years induced many of our English jurists to addict their studies more peculiarly to some particular branch of practice.

THE great nicety required in duly and effectually alienating or incumbering estates, and in securing them according to limitations to be governed by future contingencies, either by devise or otherwise, and the exactness also necessary in certain instruments respecting personal property, and in articles of copartnership and the like, form the laborious occupation of conveyancers; who rarely engage in other lines of the profession. The unnecessary prolixity, and the now necessary shifts and contrivances, used in conveyancing, are frequent and popular matters of complaint. It must not be dissembled, that this branch of our law has run out into such nice refinements, such subtle distinctions, and such hardly perceptible webs of artificial sophistry, as might perhaps suggest, to any but an English lawyer, an idea of ludicrous puerility. In framing laws *de novo* for a

¹ Yearb. 11 E. IV. 3.

² 2 Inst. 213, 214.

³ 1 Inst. 214.

people,

people, where contingent remainders and collateral warranties had never yet been mentioned, it would be very superfluous to transcribe into their code some of those complex rules, which here absolutely govern the title to estates. But in process of time all civil institutions of the merely positive kind unavoidably acquire similar excrescences. In England, opulence and liberty, and a variety of other causes (as our juridical history informs us) have conspired to the same effect. We may be better reconciled to these laborious intricacies of the profession; by considering the danger of departing from former adjudications; and by reflecting that (although we frequently hear of hardship and disappointment) in truth the established and indispensable rules for transmitting property are merely of positive institution, and have no prescript in the primitive moral law of nature.

SECONDLY, The science of settling in due order, and for the best advantage of the client, the several pleadings of a plaintiff or defendant, which are put upon record before the trial, belongs to special pleaders; who have the conduct of actions at law, before they come to public hearing; and who are alike conversant with the forms of indictments and other proceedings in criminal prosecutions. It is impossible in any degree to merit the character of an English lawyer, without some acquaintance with the doctrines of special pleading; a science which hath always been spoken of with high encomiums by the greatest proficient in legal learning. A competent degree of information in this branch of study gives an insight into the meaning of causes, clothed with the necessary language of records; and may perhaps not unaptly be compared to the usefulness of anatomical skill in the medical profession. It brings litigations to a single point, not pregnant with, or divisible into two or more propositions; in which respect it may be considered as a practical logic, of real benefit and importance. Another genuine use of this science is, that the antiently approved and highly accurate language of special pleading often furnishes an argument to demonstrate what the law is, and serves to illustrate its greatest difficulties.

LASTLY, Corresponding to the formalists in the common law, there are others, who prepare bills, answers, exceptions, pleas, demurrers, and interrogatories, in courts of equity. To understand the various kinds of bills, and the proper defence to them, requires a considerable degree of general professional knowledge, and also a studious investigation of this particular subject. In respect also even to the formal language of these proceedings, though less scientific than that of special pleading, yet it may be observed that a familiarity with precedents may save much time and labour, and prevent too daring a deviation from the idiomatical phraseology, adhered to in courts of equity.

To acquire skill in these three several branches of the profession, it has of late years been very usual for the young student to get himself admitted to, and exercised in, the domestic scenes of actual business carried on by some eminent practitioner; where he may as constantly attend, as Cicero¹ did on Scævola, whom he was brought to by his father at an early age for the same proposed advantage, instruction in the laws of his country.

I SHOULD here be naturally led to discourse of the institution established in this university as a help to legal education, by a wise and liberal benefactor; but the general nature and advantage of it has been fully and elegantly discussed by the celebrated Commentator on the laws of England. It may not be improper to subjoin, that probably some utility might be derived from the Vinerian Lectures, even under their present conduct, if it were only to habituate the minds of the audience to oral instruction on legal subjects, and to induce them, at their earliest leisure, as a proper juridical exercise, to digest the brief notes, which it may be thought worth while to take here, into a connected order and style.

In methodical dissertations on the English laws, errors are, perhaps inevitable: and caution will often suggest a guarded doubtfulness of expression. A definitive certainty of knowledge,

¹ Cic. de Amic. in princ.

in a great variety of legal topics, is hardly to be expected from the maturest proficient, with all the aid of practical experience. It is something to prepare the student for greater professional attainments, and to familiarize his mind to the subjects of his studies, in a manner properly didactic, and fitted to strike or please the attention; for he may be thought to have made no inconsiderable progress, who can himself duly investigate, or with tolerable readiness understand others who treat of, the abstruser points of law.

THE publication of those admired Commentaries, which first did honour to this institution, and in which every subject is just so far entered into, that the parts are systematically proportioned to the whole, undoubtedly has assisted the labours of every student of the law; and I may add (not with a view to condolence, but in the way of apology) that it has perhaps equally increased the difficulties attending the professor's office. I trust, therefore, when any thing in these Lectures appears trite or uninforming, that my auditors will call to mind the nature and weight of the undertaking, and the necessity of occasionally introducing such obvious matter; when any thing is obscure, that they will give me an opportunity of attempting to explain it in conversation; and when there happens to be conveyed any useful knowledge or improving suggestion, that they will embrace it to their own advantage.

THE work just alluded to is so complete a repository of rudimental knowledge, that it is not easy for a successor in the author's function to enter more minutely into any legal subject, so as to be intelligible to a young auditor, without either repeating in a different method and expression, or else supposing him acquainted with the elementary learning therein contained. The latter would be an awkward and inelegant course to be pursued: and as to repeating such matters as may be read at leisure in that excellent compilation, I shall in the ensuing Lectures very studiously avoid, as much as possible, any superfluous recital of that kind; endeavouring for the most part to make my observations

vations so far supplemental to those Commentaries, as not unnecessarily to contain the very points therein expressed; preferring use to ornament, and adopting a plan less regular perhaps, less critically methodical, than might have been followed if that publication had never appeared. A varied distribution of the same subject, though not so gracefully arranged as a former one, may not be without its use; as things placed in a new point of view, though they may appear less elegant and becoming, may yet discover properties not before seen or noticed. Regard was to be had to the insertion of such particulars, in such a method, as might best engage the attentiveness and the memory of the audience. What I therefore propose, and anxiously wish to accomplish, is, that these Lectures may not be wholly unprofitable to those who are well acquainted with Sir William Blackstone's work, because every student may make himself acquainted with it. But at the same time it would be very improper, for many reasons, to conclude that every student, before his attendance here, has actually perused that work with sufficient care and assiduity, not only in a competent degree to understand, but also to remember its contents. It will therefore be necessary, upon every subject, to set forth so much rudimental or elementary doctrine, by way of definition, distinction, or general principle, as may give an air of regular arrangement to that which follows, and render it intelligible to him who is not yet conversant with any writers in our law. Herein I must be contented, with some reluctance, to mention the same things as may in substance be read in divers juridical authors of the methodical kind. But even here a difference of expression may perhaps serve to elucidate and explain the principles laid down, or to implant them better in the memory. There may be some use even in barely selecting and repeating things worthiest of being known and kept in remembrance, of the most importance and most general use. I must add, that without recurring to the elementary rudiments of the law, as heads under which the particular doctrines to be delivered may be distributed, it would be impossible to maintain any symmetry or order; which essentially recommend all works of industry and skill. Lastly, in a study so difficult at
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LECT. VI. *of the Laws of ENGLAND.*

III

the same time, and so important, as that of the laws of England, any help or assistance, however small, is intitled to some proportion of regard.

It is now time to delineate the plan intended to be pursued in the succeeding Lectures, according to the printed scheme, with the reasons, very briefly, of that distribution.

I SHALL adopt the same threefold division which the Institutes of Justinian have taught us, and which appears to me the most clear, and analytically just; considering our laws, first, as referred to Persons, or the several capacities of men in civil life; secondly, as referred to Things or Property; and, thirdly, treating of Actions.

THE great relation, in which the members of civil society stand to each other, is that of governors or magistrates, and subjects. All kinds of magistracy or civil dominion may, as we have before seen in the third of these preliminary discourses, be properly referred to three kinds, legislative, executive, and judicial, or the distinct powers of enacting, executing, and interpreting laws. I shall therefore, under the first head or division of the laws, as referred to persons, first speak historically of the establishment of the legislature, and of the constituent parts and collective capacity of the parliament; secondly, of the king, or supreme executive magistrate; and, thirdly, of courts of judicature. In treating of jurisdictions, I shall first consider the courts that proceed according to the general laws of the land (which account it is not possible to omit, consistently with any regard to order, though they must indeed chiefly contain obvious matters); next, those that are allowed to govern themselves by a peculiar system, as the civil, ecclesiastical, maritime, and forest laws; then I shall endeavour to trace the origin and nature of the Chancellor's office and court, and shall speak of courts of equity in general; and afterwards shall discuss the civil jurisdiction of the lords in parliament, as a court of appeal from inferior judicatures both of law and equity. After this account of courts, I shall treat of officers

magistrates, both of the judicial, and executive or ministerial kind, beginning with some of the great officers of state. Having thus spoken of the several kinds of dominion, or persons governing, we must next contemplate the body of the people governed. This will lead us first to consider the clergy, having before treated of those among them who have judicial authority, under the title of ecclesiastical jurisdictions. This account of the clerical order will introduce a detail of the legal establishment of the national religion. I shall afterwards discourse of the state of persons (a phrase taken from the Roman civil law) under which I shall include the legal effects of certain distinctions, consisting chiefly in disabilities, as of infants and others. I shall then consider persons in their private, domestic relations; and shall conclude this first general division, concerning the laws as referred to Persons, with an account of corporations, to which an artificial personality is ascribed.

In the second general division, concerning the laws as referred to Things or Property, I shall pursue the great distinction which our municipal institutions have made, and which in all parts of them is so strongly marked, between real and personal estate. Under the title of Real Estates, I shall first speak of the quantity of interest therein; secondly, of the tenure by which such interest may be holden; thirdly, of incorporeal hereditaments, and more particularly of tithes; fourthly, of the joint and contemporary ownership of estates; fifthly, of estates upon condition, more especially of mortgages; sixthly, of estates in possession, and in expectancy, as remainders vested and contingent, and executory devises; and lastly, of the title to estates, by deed, by matter of record, and by devise. Under the title of Personal Estate or Property, I shall first mention various means of acquiring it, in a concise and cursory manner, because these subjects are treated of so clearly and fully by Sir William Blackstone, that it would be difficult to make any very useful addition to his account of them; but, secondly, I shall allot a whole Lecture to the consideration of captures at sea, because I know not where the doctrines relating to them are brought together and digested into

into any methodical order, and because they merit attention, though they rarely have much dependence on municipal law, strictly so called, and not considered as comprehending the law of nations: after which, I shall conclude this second general division with speaking of the title to personal property by testament, and by succession in cases of intestacy.

THE third general head or division, concerning Actions, will subdivide them into criminal prosecutions, private civil actions, and suits in courts of equity. Under the first of these titles I shall begin our entrance into the *forum contentiosum* with a short consideration of punishments in general, and of the more general classes of temporal offences, because the definitions of crimes are readily met with in many books, and it is inconsistent with my general design to be prolix on this subject; which is more easily comprehended, and less in need of elucidation, than most other parts of our law, and is besides so happily digested and illustrated in that valuable work, Serjeant Hawkins's Pleas of the Crown. I shall then speak of offences against the established religion, and of the laws relating to the nonconformity of the Roman Catholics and Protestant Dissenters. The modes of criminal prosecution will afterwards come into consideration. Here I shall take a transient view of the laws in this respect of some other countries; and shall then treat first of indictments, secondly of informations, thirdly of appeals, fourthly of trials by the peers of the realm, fifthly of parliamentary impeachments, and lastly of bills of attainder, and of pains and penalties: in which Lecture the moral fitness of such legislative judgments will be discussed. Under the title of Private Civil Actions, I shall first consider real, and secondly mixed actions. Then I shall give some account of the altercations upon record in personal actions, and shall attempt to elucidate in some measure the rational foundation of the rules of special pleading. In the following Lectures I shall treat of various kinds of personal actions, arising *ex contractu*, or *ex delicto*, or founded on real or implied force and violence. Under the head of Actions of Assumpsit, I shall take occasion to speak of divers writings or instruments, in

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which

which that form of suit is to be used, particularly policies of insurance; and in treating of Actions of Replevin, I shall introduce some remarks on the doctrine of distresses. Under the head of Evidence, I shall first speak of the competence and credibility of witnesses, and secondly of the admissibility of various kinds of written proof; and shall conclude the title of Private Civil Actions, with remarks on the incidents previous to, at, and after, trials by jury. The last title is that of Suits in Courts of Equity. This will lead me first to speak of the practical proceedings in those courts, and secondly of such matters as are most frequently brought, or most peculiarly appropriated, to equitable jurisdictions; as first, the granting of injunctions; secondly, the performance or rescinding of agreements, whether affected by the statute of frauds or otherwise; and lastly, causes of the testamentary kind, which will be the ultimate subject of our enquiries.

A SUM-

S U M M A R Y
OF THE
VINERIAN LECTURES,

BEGUN TO BE READ AT OXFORD IN THE
YEAR 1777.

PRELIMINARY DISCOURSES,

- O**F the Laws of Nature. I.
Of civil, positive, or instituted Law. II.
Of the several species of Magistracy. III.
Of the Law of Nations. IV.
Of the Laws of England, in a general view, and with respect
to the various sources from which they have been de-
rived. V.
Of the study and profession of the Laws of England, with a
delineation of the plan pursued in the following Lec-
tures. VI.

I. GENERAL DIVISION.

OF THE LAWS AS REFERRED TO PERSONS.

Of the establishment of the supreme Legislature. VII. VIII.

Of the supreme Executive Magistrate, IX.

Of Courts,	{	whose proceedings conform to the ge-
		neral Laws. X.
		not proceeding by the general Laws.

Of Judicial
Magistracy.

{	Of the origin of the Court of Chancery, and of
	Courts of Equity in general. XII. XIII.
	Of the civil jurisdiction of the Lords of Parlia-

{	ment. XIV.
	Of inferior Magistrates. XV.
	Of the Clergy; and of the Laws which establish and maintain

{	the national Religion. XVI. XVII.
	Of certain legal distinctions among the Subjects of the State.
	XVIII.

{	Of Persons as considered in private and domestic Relations. XIX.
	Of Corporations. XX.

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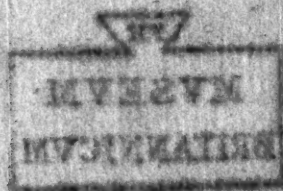
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II. GENERAL DIVISION.

OF THE LAWS AS REFERRED TO THINGS, OR PROPERTY.

- Of Estates in respect to the quantity of Interest. XXI.
- Of the tenure of Estates. XXII.
- Of incorporeal Hereditaments. XXIII.
- Of the joint and contemporary ownership of Estates. XXIV.
- Of Real Estates. Of Estates upon Condition. XXV.
- Of Estates in possession and expectancy, as Remainders vested and contingent, and executory Devises. XXVI. XXVII. XXVIII.
- Of the Title to Estates, by Deed, by Matter of Record, and by Devise. XXIX. XXX. XXXI. XXXII.
- Of various means of acquiring Personal Property. XXXIII.
- Of Personal Property. Of Captures at Sea. XXXIV.
- Of Title to Personal Property by Testament, and by Succession in case of Intestacy. XXXV.



III. GENERAL DIVISION.

OF ACTIONS.

- Of Punishments in general; and the more general classes of temporal Offences. XXXVI.
- Of Offences against the established Religion. XXXVII.
- I. Of Criminal Prosecutions. Of the ordinary modes of instituting criminal Prosecutions. XXXVIII.
- Of Trials by the Peers of the Realm; and of parliamentary impeachments. XXXIX. XL.
- Of Bills of Attainder, and Bills of Pains and Penalties. XLI.
- Of real and mixed Actions. XLII. XLIII.
- Of pleading in Personal Actions. XLIV.
- Of certain kinds of personal Actions. XLV.
- Of Actions of Assumpsit. XLVI. XLVII.
- II. Of Private Civil Actions. Of special Actions upon the Case. XLVIII. XLIX.
- Of Actions of Replevin. L.
- Of Actions of Trespass. LI.
- Of Evidence. LII. LIII.
- Of Incidents previous to, at, and after, Trials by Jury. LIV.
- Of the practical proceedings in Courts of Equity. LV.
- III. Of Suits in Courts of Equity. Of the granting of Injunctions. LVI.
- Of the performance or rescinding of Agreements. LVII. LVIII.
- Of testamentary Causes. LIX. LX.



